Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

Walter W. Marsh and
Charlotte D. Marsh,
Petitioners

v.

Board of Zoning Appeals of Chesterfield County
and
County of Chesterfield, Virginia

On Petition For Writ of Certiorari
To The Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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126 pp.

a. Questions Presented for Review:

1. Whether claimed, vested real property rights may be taken by a County's political process, without minimal adjudicatory due process, as guaranteed by the U.S. Constitution, (Fourteenth Amendment, U.S. Const. App. p i).

2. Whether as a matter of due process any state Court may interpret its case law in a manner that ignores and thus voids an unambiguous requirement of the State Constitution that created it.

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d. Citations to Unofficial Opinions Below

i. Administrator of Chesterfield County's Ruling Letter with notice of violation. Please see Appendix, page iv to vi. Item e.

ii. BZA's rulings taken from transcript of proceedings. Please see App. p. vii to xii. Item g.

iii. Chesterfield Circuit Court Opinion Letter issued prior to hearing and argument. Please see App. p. xiii to xvii. Item h.

iv. Chesterfield Circuit Court Final Order. Please see App. p. xvii to xx. Item i.

v. Virginia Supreme Court denying writ of certiorari ruling. Please see App. p. xx to xxi. Item j.

vi. Virginia Supreme Court denying rehearing request. Please see App. p. xxi. Item k.

e. Basis for Jurisdiction

The last ruling denying petitioner's motion for a rehearing was entered on November 1, 2002, by the Virginia Supreme Court. Appendix p. xxi. Item k.

The basis for the jurisdiction of this Court is found in 28 U.S.C. § 1257, empowering the Court to grant writs of certiorari to each State's highest appellate Court.

This petition is filed within the 90 day time permitted by the Rules of the Supreme Court of the United States, (the "Rules"), and service was had on opposing parties according to said Rules. A certificate of same is filed herewith.

f. Constitutional Provisions, Statutes and Ordinances Involved

i. U.S. Constitution, Fourteenth Amendment, please see Appendix, P. 1.

ii. Virginia Constitution, Art. 7 § 7. Please see App. p. i. Item a.

iii. VA Code § 15.2-2314, Appeal from BZA. Please see App. p. xxv. Item m.

iv. VA Code § 15.2-2312, Authorizing BZA to subpoena and swear witnesses, conduct an adjudicatory hearing. App p. xxvii.

v. VA Code § 2.2-4000, *et seq*, Administrative Process Act, esp. informal and formal fact finding procedures, §§'s 2.2-4019 and 2.2-4020. Please see App. p. xxvii *et seq*..

vi. Chesterfield County Ordinance, Granting Use Permit to Operate an Airport and Industrial Zoning, Case No. 69-64CS.. Please see Appendix, p i. Item c.

vii. Chesterfield County Ordinance, County-Wide Rezoning, From Minute Book Nineteen, dated Nov. 27, 1972, App. p. iii. Item d.

g. Statement of the Case (Including Preservation of Federal Issues)

Petitioners own land next to the Chesterfield County Airport, in Virginia, which land petitioners claim was rezoned industrial with a Use Permit to operate an airport by the adoption of the same ordinance that the County adopted to authorize the county airport and industrial park. Please see Chesterfield County Ordinance granting the zoning and Use Permit, App. at p. i.

At that time, the County rezoned and granted a Use Permit to a great amount of land in excess of that used by the County for the airport and industrial park, because the Board of Supervisors did not know the eventual size and placement of the eventual airport and industrial park.

After petitioners' learned that the same County Ordinance that created the County airport listed petitioner's land[1] first among the parcels so effected, the petitioners took the physical steps to legally vest their real property rights in the zoning and Use Permit by building an airstrip, and the ancillary use of other improvements for the airstrip's operations.[2]

The legal process against petitioners began shortly after the petitioners commenced minor operations at the air strip with a notice of violation for the operation of an airport without a special use permit and then with a summary administrative action by the Director of Planning, ruling that the petitioners had no rights in any Use Permit to operate an airport or in the industrial rezoning that took place many years ago. (App. P. iii).

The only appeal available from this letter ruling was to the Board of Zoning Appeals, a body usually

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[1] The list of parcels listed the undisputed predessessor parcel from which the petitioner's lands were drawn.

[2] There is no dispute about what the petitioners did to vest their rights.

used to grant relief from the too harsh application of zoning laws, on a political basis. It's cases are normally political, not adjudicative in nature. The statutes that authorize and empower the BZA, however, have features that permit the BZA to act as an adjudicator, giving the BZA subpoena powers, and the power to swear witnesses and the like to implement the BZA's occasional adjudicatory function. The Chesterfield BZA very rarely serves as an adjudicator, it appears. Code of Va. § 15.2-2312. (App. p. xxvii).

As the case was approaching, petitioners requested the BZA to utilize the features of the statutes that allowed for an adjudicative hearing. Petitioners when turned down made a proffer in writing to record their requests for sworn witnesses, subpoenas, cross examination and the like. App. p. xx *et seq.*

Notwithstanding these requests, the procedural choices consciously made by the BZA added up to the usual political bended knee case, ignoring the petitioner's requests for the minimally mandated adjudicatory due process guarantees given by the U.S. Constitution, (Amendment XIV. App. at p. 1). It is not that the statutes did not set up the requisite capacity for an adjudicatory hearing, but that the BZA flatly refused to conduct one. The rules of procedure applied were those for individuals who were applying to *secure new rights*, not to adjudicate rights the taking of existing rights afforded constitutional protections.

No witnesses were permitted to be sworn and no confrontation of persons giving their unsworn statements, which did not qualify as testimony, was permitted. These basic features of due process the swearing and confrontation of witnesses, normally considered to be benchmarks for whether an adjudicatory process was taking place, were refused.

The entire tenor of the hearing was political with all the features of the rough and tumble of such a hearing. Prejudicial innuendo about someone, perhaps one of the petitioners, cutting County trees in the dead of night, as irrelevant as this discussion was, could not be successfully excluded, (App. cv). Public safety concerns about ultra-light flight was discussed at length. (App. cv). The usual BZA counsel, in this case representing the County, made rulings from the floor apparently on behalf of the BZA, and was never restricted or questioned by the BZA or its counsel. (App. cv). Pure unadulterated conjecture (albeit well meaning) was presented as testimony where no knowledge of facts existed and which conjecture could not be tested by oath or confrontation, because no such test was permitted. Opinion and unofficial records were used to overturn official records based on unsworn conjecture which are picked up by the BZA Board Members and used to overturn Official County Records. (App. p. cvi).

The next venue for this case was the Chesterfield Circuit Court, which relied on standards of review as though the BZA were acting as an independent agency, which is how it usually acts, in the bended knee (political) cases, and refused to apply a rule of review that permitted the correction of the refusal to adhere to minimally U.S. Constitutionally guaranteed rights. (App. i). The Circuit Court did not believe that it had the power to overturn the BZA pretty much no matter what. The Court made its ruling before there was a hearing and argument. (App. P. xiii), but later decided to hear the argument and then reissued its ruling. (App. p. xviii). There was no merits review at this or any level.

Petitioners next applied for a writ of certiorari from the Virginia Supreme Court, which declined to hear the case, based on no apparent reversible error, (App. p. xx), and the petitioners sought a rehearing of this decision which was also not granted, (App. p. xxi).

Based on this refusal, the petitioners decided to seek a writ of certiorari from the United States Supreme Court.

There are quite a number of other legal issues presented in the case at bar however, for this federal appeal and the sake of clarity the petitioner shall address facts which relate to the issue of whether the effect of the granting Ordinance was amended away by a later zoning ordinance, which if effective, rezoned the petitioners' real estate from industrial to agricultural.

The later ordinance was properly attacked by the petitioners at each level of the case as being fatally defective for the failure of the Board of Supervisors to comply with a provision in the Virginia Constitution requiring that the vote of each Board Member be recorded individually in order for the ordinance to be properly adopted.

The later ordinance was attacked by petitioner at the BZA hearing, (BZA trans. App. p. x), at the Circuit Court (App. xv), and in the Virginia Supreme Court, (App. P. lxvi, Item 11.). The fatal defect killed the adoption of the rezoning ordinance, which made the enactment of the ordinance invalid, killing its ability to change the zoning of the land in question or any land in the county. This was not a popular position for petitioners, as the later ordinance was the County-wide restructuring of its zoning scheme.

Petitioners seek the granting of the writ and the enforcement of the U.S. Constitution's mandate that property not be taken without due process, and that state Courts be required to operate within the terms and conditions of their constitutions. Petitioners seek this case to be remanded to the trial level where state Courts may retry this matter *ab initio*, since the BZA was so unwilling to apply minimal due process standards. Returning this case to the BZA is argued

to be impractical as a reasonable forum for this adjudication of the petitioners rights.

h. Argument

The Fourteenth Amendment to the U.S. Constitution Guarantees that Property Rights Will Not Be Taken Without Due Process

The petitioner's first and principal federal complaint is that the County used administrative and political processes to unlawfully take the petitioner's property rights without the protections of minimal adjudicatory due process guaranteed by the United States Constitution. (U.S. Const. Fourteenth Amend., App. P. i).

> "The right to procedural due process is guaranteed in the Fourteenth Amendment to the United States Constitution, which provides that no person shall be deprived of life, liberty or **property without due process of law. Due process claims must be addressed in a two-step inquiry. "First, there must be a deprivation of a liberty or property interest." Jackson v. W., Va. App. , , S.E.2d , (citing Klimko v. Virginia Employment Comm'n, 216 Va. 750, 754, 222 S.E.2d 559, 563 (1976)). If there is a deprivation of a liberty or property interest, due process applies and the second step of the inquiry focuses on what process or procedures are required to satisfy the fourteenth amendment. Id. at , S.E.2d at (citation omitted). *Turner v. Jackson*, 14 Va. App. 423, 417 S.E. 2d 881 (Ct App. 1992) 1992 Va App. Lexis 131.**

In the case at bar we have two distinct real property rights alleged to be held by the petitioners, namely the right to exercise a Use Permit to operate an airport and independently the right to exercise the industrial zoning rights. Each of which rights flow from the very County Ordinance which is indisputably valid because it authorized the creation of the County's airport and industrial park on the lands contiguous with the petitioners, and has existed for a generation without challenge. Please see a verbatim copy of the County Ordinance creating the alleged petitioners rights and the County airport and industrial park. App. p. i.

It is not disputed that the very first parcel listed in the County Ordinance as being affected by the new zoning and Use Permit is the parcel from which the petitioners parcel was later taken. App. p ii. Nowhere in the Ordinance was there reference to only a part of the parcel being affected. In fact the acreage of the entire parcel is listed in the Ordinance. *Id.*

As this case proceeded from the administrative phase where it was the subject of a letter ruling by the County Administrator, denying that the petitioners had these rights, and then to the petitioner's appeal to the Board of Zoning Appeals, (BZA), being the only venue for appeal from such a letter ruling, the petitioners made and remade their requests for their basic due process rights. Please see the written proffer submitted prior to the BZA hearing stating that the petitioners moving for the BZA to exercise its statutory powers to swear and subpoena witnesses, permit cross examination and the like. (App. p. vii). These requests were renewed at the Circuit Court level where they were denied (App. p. xviii and xxx), and raised in the petition for certiorari from the Virginia Supreme Court. App. p. lix.

When petitioners requested the right to cross examine, (App. p. cv), the County's unsworn "witnesses" at the BZA the answers were:

"We will see about that later...(App. p. cv.)

"The witnesses are going to stay around to answer the questions of the Board members, not for you (App. p. cv).

No discovery was permitted; no advance notice given of what facts or law would be used against the petitioners. Poisonous allegations without proof were injected by the County and admitted by the BZA, (App. p.cv), as were comments which were nothing more than supposition given as fact, and there were no rules of evidence or any safety of any kind to insure that due process was observed. At the risk of being boring petitioner repeats, that 1) no witnesses were sworn and no confrontation of witnesses was permitted.

Petitioners have made several arguments in the various appeals and requests for rehearing that go to what a citizen ought to be able to expect at an administrative hearing concerning the validity of their property rights claims that compare what the Virginia Administrative Process Act requires for agencies that come under its jurisdiction in both informal and formal hearings. (Code of Va. §§'s 2.2-4019 and 4020, App. P. xxvii *et seq.*). Petitioners no longer expect that the BZA process will be so reformed as to substantially comply with the standards of that Act. Petitioners do however feel they have the right to expect that the U.S. Constitutional minimal due process safeguards would be afforded them in any administrative process.

In the entire 29 year experience petitioner's counsel has never once in any venue seen the litigation of a substantial right without the swearing of witnesses to tell the truth and the right of the party litigant to confront opposing witnesses. He hopes he

shall not have to see such a procedure again in this country.

The United States Supreme Court specified the minimum requirements of constitutional due process which must attend administrative hearings, **the right to confront adverse witnesses, and present one's own evidence, and an impartial decision maker.** ***Goldberg v. Kelly*****, 397 U.S. 254 (1970);** and this case is followed in Virginia, in ***Hladys v. Commonwealth*****, 235 Va. 145, 366 S.E. 2d 98 (1988).**

Implicit in the foregoing statement about confronting witnesses is the notion that the witnesses be presenting *testimony* It has always been in our legal system that witness testify under oath when they are supposed to be telling the truth. When they are giving opinion in a political hearing, they do not testify but give their feelings on a subject, like whether or not their next door neighbor should be allowed to put a porch within a set-back line, or whether the odor from a chicken plant will be a public nuisance in a neighborhood.

When an administrative agency organizes to adjudicate, it swears the witness to tell the truth and it permits the party whose rights hang in the balance to question those who testify against it.

§15.2-2312 of the Code of Virginia grants the BZA the discretion to swear in and subpoena witness, but that discretion, the right to chose, cannot be used in a way that it fundamentally denies the parties the opportunity to have a full and fair or at lease a minimally fair hearing. While it might be argued in some of the Board's cases that swearing and subpoenaing witnesses are not necessary, but where as in the case at bar, there are substantive property rights for adjudication, with the County on one side and a private citizen on the other, and the citizen asks that witnesses be subpoenaed and sworn, (please see pp. 42, line 15 and lines 20-21 of the BZA transcript),

petitioners argue that the failure to grant these requests are an abuse of discretion and unconstitutional.

> **(D)ue process is flexible and calls for such procedural protections as the particular situation demands. *Mathews v. Eldridge*, 424 US 319, 319, (1976).**

The BZA had the tools to do either a political determination, as it usually has to do in "bended knee" cases, and the tools to comport with minimal due process standards and provide an adjudicative process. It had the power to get sworn statements, what we call testimony from the persons appearing, but chose not to. Why this was so is beyond understanding.

The BZA did not provide discovery, although they could. The BZA did not provide the opportunity to cross-examine witnesses, although they could. The Marshes asked for each of these rights, many of them were asked for a number of times.

Although, standards change as the situations change, our Virginia Supreme Court has said that each citizen should have:

> **[A]n opportunity at the hearing to present testimony of witnesses...and to confront and cross-examine witnesses called by the state, except upon a finding not arbitrarily made, of good cause for not permitting such presentation, confrontation or cross-examination. (as in the instant case due to mental health problems) *Klimko v. VEC, 216 Va 750, 1978).***

The BZA did not distinguish between an adjudicative hearing and a political hearing, and the result was the denial of due process which is the

landowners' right before being deprived of any significant property right. The landowner is to be given an opportunity at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of his case. (*James v. Arlington Bd of Supervisors*, 226 Va 284, 289-90, (1983). This is something that these appellants have not had in this case and they implore this Court, as the Court of last resort in the United States to grant a writ of certiorari to the Virginia Supreme Court to consider the merits of petitioner's appeal on this issue.

Courts Cannot Overturn Unambiguous Provisions of the Constitution that Created It.

The County has tried to argue that the Ordinance granting the Use Permit and industrial zoning was swept away by a later county-wide zoning ordinance in the early 1970's purporting to change the subject property from industrial to agricultural zoning.

First petitioners state that the fact of the alleged rezoning has no impact on the separate and independent Use Permit to operate an airport, particularly where the Use Permit was legal under both industrial and agricultural types of zoning. This means that the rezoning had no impact on the existence of the Use Permit to operate an airport in any event.

Secondly, the later county –wide rezoning ordinance was fatally defective in the failure of the Chesterfield Board of Supervisors to properly record their vote adopting it, as required by the Virginia Constitution, VA Const. Art. 7 § 7. That provision requires that the actual vote of each Board Member be recorded so that all can see how each Member voted. A quick reading of the later ordinance provides clear

proof that the County failed to comply with this Constitutional requirement, therefore the ordinance is never enacted and it fails to take effect.

At all levels the County argued in response to petitioner's constitutional attack, that a Virginia Supreme Court opinion, *Town of Madison v. Ford*, stood for the (illogical and unconstitutional) proposition that ordinances adopted before the date of the case would no longer be attackable based on the failure of the Board of Supervisors to comply with the Virginia Constitutional requirement. 255 Va. 429, (1998). Since the Ordinance rezoning the entire county in 1972 predated the *Town of Madison v. Ford* case, the Virginia Constitutional provision for recording the vote would no longer be mandatory, and therefore the rezoning ordinance would be effective regardless of the constitutionality of its adoption.

The entire dispute turns on the last sentence of the majority opinion which rules that the effect of the opinion was only to be applied *prospectively*. The County argued and the Courts below accepted that this means no more attacks are permitted on county ordinances occurring before the date of the *Madison v. Ford* opinion. This interpretation leads to the inescapable conclusion that the voting provision of the Virginia Constitution is therefore nullified by the Virginia Supreme Court, only to arise from the deceased after the date of the opinion. Can a Court created by a constitution nullify a part of the constitution that created it, and then revive the power of that provision on its command? Petitioners strongly disagree with this flawed interpretation.

Petitioners fostered a different interpretation of *Town of Madison v. Ford*, that integrated the prospective operation of the *Madison v. Ford* opinion with the constitutional provision requiring the special recordation of votes adopting ordinances. Under the petitioner's interpretation the integrity of *Madison v.*

Ford, remains unblemished, but so does the integrity of the Virginia Constitution. The voting provision of the constitution is either valid or not, from the time of its enactment going forward in time. Arguing as the County does, that the Virginia Supreme Court can ignore a constitutional provision and then reinact it is asking for the Virginia Supreme Court to act in a way that is *ultra vires*. Unfortunately there is no venue but in the U.S. Supreme Court, that can remedy this situation. This is really another a due process issue that was framed more technically below as a state constitution issue.

The difference of opinion as to what meaning to ascribe to the language in the case that the ruling was only to be proscribed prospectively has to be taken into account along with the big picture of what the Court was attempting to do. The fact that a county failed to comply with the Virginia Constitutionally required voting recordation for a given ordinance would likely mean that many more of that County's ordinances would also likely be invalid, because if a Board of Supervisors did not know to comply once with the particular vote recordation requirement it makes sense that this failure might be pandemic in that county's public records, which could result in the catastrophic voiding of all or much of a County's ordinances.

The Virginia Supreme Court would not wish to cause more trouble than was necessary to achieve giving the petitioner Ford, her relief. The best interpretation of the prospective ruling is as follows. The Court will grant petitioner or plaintiff relief from an offending ordinance, and if in the future, if a party has the tenacity to pursue their rights in Court, the Court will grant that future litigant the same relief given Ford, but the Courts are not going to look for errors of omission in the ordinance books of the counties to find improper vote recordations and wholesale wipe out ordinances.

Chesterfield County's notion that the prospective language in *Town of Madison v. Ford*, means that that citizens may not attack ordinances that predate *Madison v. Ford*, is *ultra vires*, completely unauthorized and unconstitutional itself.

Lastly, the Supreme Courts of the States, and the court systems under them, are creatures created by their state constitutions. While it is within the province of the Courts to interpret their constitutions, statutes, and ordinances, it goes without saying that the Courts may not rewrite the state's constitution when the meaning of a provision is plain and simple and not in conflict with other provisions.

In the enactment of the 1972 Virginia Constitution the drafters sought to implement a method of voting by Boards of Supervisors so that the record would indicate who was present at the vote and how each Member voted. Simple enough. The sound public policy underlying the rule was to avoid secret votes and the ability of Supervisors to avoid responsibility for what they have or have not done. Also, quite a simple and salutary rule.

Regardless of what may have been subjectively in the minds of the Virginia Supreme Court Justices when they voted on the *Madison v. Ford*, 255 Va. 420, (1998), it is absolutely necessary to interpret it in a manner that is consistent with the Virginia Constitution, if that is possible.

The only acceptable interpretation of the case is that the Justices were fearful of ruling in such a way that it would do violence to the entire zoning scheme of a county and so they ruled just for the litigant before them, that she had defeated the ordinance she attacked based on the failure of the Supervisors to have their votes properly recorded. The Justices left the "big picture" zoning scheme intact, and warned the County to be more careful about recording votes in the future.

This language mandating only a prospective application of the rule is erroneously interpreted below and by the County as meaning that the Virginia Constitution's unambiguous provisions are not available all the time to all citizens. The Virginia Supreme Court does not have the legal power to void an unambiguous provision of the Virginia Constitution which is not in conflict with any other provision, and then say after a certain date the provision springs back to life. Any such interpretation makes the opinion *ultra vires*, and worthless.

The true interpretation of the prospective application of the ruling is that the Virginia constitutional provision requiring the recordation of Board of Supervisors votes it is available for all citizens with the gumption and tenacity to challenge any ordinance adopted without complying with the provision.

It is not the date of the adoption of the ordinance that the prospective language addresses, but the distinction is being made between a blanket statement that all such ordinances that fail to have the vote recorded constitutionally fail automatically, and the wiser choice of saying, as the Virginia Supreme Court did, that such a defect would not cause a wholesale destruction of a county's ordinances. It would take a prospective litigant to bring the suit forward to challenge defective ordinances. So to that extent the ruling operates prospectively, requiring an active litigant to press their rights forward to achieve their goal *vis a vis* a particular ordinance. The petitioners are just this type of litigants who are entitled to have the later zoning ordinance invalidated as to them, leaving in place the granting Ordinance with the industrial zoning and the Use Permit to operate an airport in effect.

As to the future, the warning is out there for the counties. (Actually, there is the argument for a

speedy review of the status of ordinances, because they could be reenacted before they were challenged).

Conclusion

For the above reasons, do your petitioners pray that the U.S. Supreme Court, grant the writ to the Virginia Supreme Court, review the issues presented, and reverse allowing for a new trial of the issues on the merits, which has never been had, and which may otherwise never be had.

Respectfully submitted,
Walter W. Marsh and
Charlotte D. Marsh

By_____
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(Certificate of Service Submitted Herewith)

i. Appendix

a. U.S. Constitution, Fourteenth Amendment:

AMENDMENT XIV

Section 1.

Citizenship Rights Not to Be Abridged by States

[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b. Constitution of Virginia

1. The Constitution of Virginia, as it was adopted effective Noon, July 1, 1971, in effect at the time of the alleged enactment of the 1973 zoning ordinance provided as it does now in Article 7, §7, the following requirement for actions by Boards of Supervisors, (in relevant part);

"Procedures.-...
On final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded."

c. Chesterfield County Ordinance Granting Industrial Zoning and a Use Permit to Operate an Airport

Case No. 69-64CS

In relevant part:

[P]etitioner requests that the Zoning Ordinance be amended to reclassify this property from Agricultural (A) & to Industrial (M) & Use Permit to grant a Use Permit to construct Airport & Industrial Complex....

Application lists Map No. 65-19, Acres 246.54
Name: Burleigh, Joel Thomas
Address: Concord, Virginia Box 52

[*being the first of the properties listed on the list of properties to be effected.*]

From the official minutes of the public meeting of the Board of Supervisors of Chesterfield County, September 24, 1969:

> **"Whereupon, Mr. Martin makes a motion, which was seconded by Mr. Dietsch, resolved that the request of the Board of Supervisors for the rezoning from Agricultural (A) Residential (R-1) and Residential (R-2) to Industrial (M) and a Use Permit to operate an airport on a parcel of and containing 873 acres, more or less, fronting 2220 feet, more or less, on state route 10 extending northwestwardly to a depth of 14,310 feet, more or less, having a southwestwardly, northeastwardly depth of 6,850 feet, more or less, being located 4,200 feet north of the intersection of Courthouse Road (Rte. 604) and State route 10, in Dale Magisterial District (Refer to sec. 65 par. 19, 35, 36; Sec. 79 par. 1, 2, 3 & 34; Sec. 79-7 par. 1, 2, & 3; Sec 79-11 par. 1 & 2), be and it hereby is granted.**

Whereupon, Mr. Apperson seeks to amend the motion to provide adequate safeguard for ingress and egress to the Cemetery and to do everything possible to save the historic cedar tree in the vicinity of the cemetery, which amendment was agreed to by the makers of the motion.

A vote being taken – Mr. Browning, Mr. Dietsch, Mr. Purdy, Jr. Martin and Mr. Horner vote Aye.

Mr. Apperson votes Nay."

d. Chesterfield County Ordinance Authorizing Countywide Rezoning:

The petitioners quote from the official minutes of the November 27th, 1972, meeting of the COUNTY Board of Supervisors, finally approving the 1973 zoning ordinance, as recorded in Minute Book, Number 19, kept in the Clerk's Office in the Circuit Court of the County of Chesterfield:

"...It was decided that Stanley crump's Store be zoned B-2 and the Clement's Store on Route 360 be zoned B-3.

Upon consideration whereof and on motion of Mr. Myers, seconded by Mr. Krepela, it is resolved that the proposed Ordinance and the accompanying maps denoting different zoning districts in the County be and the same are hereby approved to become effective January 1, 1973.

On motion of Mr. Apperson, seconded by Mr. O'Neill, it is resolved that this Board go into Executive Session.

Ayes: Mr. Horner, Mr. Myers, Mr. Apperson and Mr. O'Neill."

Nowhere in these official minutes does it say which members of the Board were present at the time of the vote, or who voted on this ordinance and maps or how each member of the Board of Supervisors voted, as is Constitutionally mandated. (see above).

e. Administrative Ruling Letters with Notice of Violation.

CHESTERFIELD COUNTY
PLANNING DEPARTMENT
ZONING ADMINISTRATION
00PE1957

NOTICE OF ZONING VIOLATION

To: Walter & Charlotte Marsh Date: April 7, 2000
Address: 8232 Chainmale Road, Chesterfield, VA 23235

An inspection was made of your premises located at 7831,7901,8100 Cogbill Road and **you are in violation of the Chesterfield County Code**, Chapter 19 (zoning Ordinance) with respect to:

Section 19-126

Operating an airport in an Agricultural District without an approved Conditional Use permit from the Chesterfield Board of Supervisors.

You may avoid penalty by voluntarily complying with the Zoning Ordinance by **04/17/00** and remaining in compliance thereafter....

You may file an appeal of this notice to the Board of Zoning Appeals within thirty (30) days of the date of this notice....

Lori Greene
Code Compliance Officer

CHESTERFIELD COUNTY
P. O. Box 40
Chesterfield, Virginia 23832-0040

May 25, 2000

Mr. Walter Marsh
8232 Chainmale Road
Richmond, Virginia 23235

RE: 7901 and 7831 Cogbill Road (Tax ID 765-675-1887 and 765-675-5843)

Dear Mr. Marsh:

I have reviewed your letter dated May 5, 2000, regarding the General Industrial (I-1) zoning with a use permit for an airport on your parcels located at 7901 and 7831 Cogbill Road and adjacent to the Chesterfield County Airport.

After careful review of the Zoning Ordinance, past and current zoning maps and taking your key points into consideration, it is my opinion that the Zoning of your parcels in question is correct as denoted on the current zoning map.

On November 27, 1972, the Board of Supervisors approved a county wide rezoning with an effective date of January 1, 1973. These zoning changes are recorded on the 1972 zoning maps that are located in the Planning Department. The approved zoning map indicates that your two parcels addressed as 7901 and 7831 Cogbill Road (Tax ID 765-675-1887 and 765-675-5843) are zoning Agricultural (A). This zoning action that was approved by the Board of Supervisors would override any previous zoning action that occurred prior to the effective date of January, 1973.

Therefore, since no zoning action has occurred on the subject parcels since 1972, it is my opinion that the zoning map is correct and the subject properties are zoning Agricultural (A) without a use permit. Consequently, no boundary changes can be made without approval for the appropriate zoning.

I hope that this information claries your situation and is helpful to you. If you have any questions regarding this matter please call me at 748-1040.

You may file an appeal of this letter to the Board of Zoning Appeals within thirty (30) days of the date of this notice. The filing fee for an appeal of this notice is $500.00. The decision shall be final and unappealable if not appealed within thirty (30) days.

Sincerely,

/s/ Thomas E. Jacobson

Thomas E. Jacobson, Director of Planning

cc: Mike Janosik, Zoning Administrator
Robert Clay, Principal Planner
Ted Barclay, Code Compliance Supervisor

f. Excerpts From Petitioner's Proffers to BZA.

"Now come [Petitioners] ... in support of their request ... that the Board of Zoning Appeals issue subpoenas compelling the appearance of ...[petitioner's] ...witnesses...

"WHEREFORE, do the ...[petitioners]...[make] the following additional requests:

a. That all witnesses testifying in the above appeals be sworn.
b. That all witnesses testifying in the above appeals, be subject to cross examination.
c. That the witnesses who are employed by the County be called by the ...[petitioners] ...as hostile witnesses.

S/ by counsel, and certified to all parties.

g. BZA Ruling (transcript):

MR. DANIELS: Mr. Chairman, unless someone else has a motion, I'll make a motion here. First of all I'd like to give some comments, I guess sort of explain how I arrived at my motion. First of all I think that the, I don't believe it's contested and I believe Mr. Jacobson has indicated what he situation is as far as County zoning, basically we start off with agriculture and basically that's where everything started with in this County and to the extent that property has not been rezoned it logically follows that it would remain agriculture. We get to this rezoning that occurred in contemplation of the airport and the original, I guess rezoning. The application lists all these map parcel numbers and list the total acreage for all those parcels. I've added this up and I'm not very good at doing math and I don't have a calculator but it looks like it's about 11 or 12 hundred acres.

We've heard from Mr. Jacobson that his research shows that back in the old days when they were just proposing to affect a portion of the tax map they didn't really indicate it and in some cases they just referenced the entire map to identify the parcels that were affected. I don't think that's to say that because there's no consistency I don't think we can draw any conclusions and we can assume that the entire parcel was, each of those tax map parcels was rezoned or was affected by the action taken by the Board of Supervisors.

The Ordinance that was adopted granted an airport on 873 acres and I think the property that Mr. Marsh has outlined according to his rough calculations, I think he said 11 hundred or 14 hundred acres or whatever and again by just my rough addition, the application listed all the tax map parcels affected between 11 hundred and 12 hundred acres. But the Board of Supervisors it appears did not rezone all that property. I think the County has admitted that the Board of Supervisors that the minutes were not or certainly were not unambiguous.

I think the issue is this, I think it would be incumbent upon Mr. Marsh to establish that his property was rezoned when that happened and I don't think the fact that if we're stuck with a situation that we can't tell which property was rezoned, I don't think we can presume it was rezoned. I think in the absence of a showing that his property was in fact affected by an affirmative action of the Board of Supervisors then I think we're back to the proposition that remains agricul ure until shown otherwise. But I think the County's records and the tax maps and everybody has been totally candid and conceding that we don't know when that tax map or when the zoning map was drawn by some employee in the County Planning Department or whatever predecessor agency

there was that was charged with the duty of keeping the zoning maps but the fact is we know that that map is quite dated and we know that and I agree with Mr. Parthemos that's the best evidence we have. We can't decide for sure exactly from these minutes alone what was done but I think we can draw an inference that if someone down in the County didn't pull these lines out of the air and make them up and certainly with all the controversy and interest that apparently surrounded the zoning for the airport, surely that would have been called to someone's attention had the lines been drawn improperly.

Also, I find and believe that it makes no sense and totally flies in the face of common sense that the County Board of Supervisors would have contemplated multiple airports in a close proximity and that seems to me to be a recipe for tragedy and disaster.

Mr. Marsh has argued that the County has rezoned a much larger area than they intended to use so that they would have maximum flexibility but I tend to agree with Mr. Parthemos had they wanted to make sure they had maximum flexibility they would have made sure that all the area was colored in, not only on the tax maps but on the zoning map.

I think the zoning map that's in the custody of the agency for the County that are charged with the duty in determining and enforcing the Zoning Ordinance is the best evidence we have here to tell us exactly what was rezoned. We know and we can tell by the minutes that they contemplated an area of 873 acres which is less than the total acreage of all the tax map parcel numbers that were listed on the application. So, we know that they rezoned less than the whole.

I believe also and I think it's import and my understanding has always been that Mr. Jacobson is the Zoning Administrator that his interpretations and his decisions are as a matter of law entitled to some deference on or part unless it can be established that he's clearly wrong. He may feel like a couple of times this Board has disagreed with him on occasion and he didn't think we should but I think that's the standard we've always tried to apply and reasonable minds can differ on whether we've always done that but I think legally he is entitled to some deference. I think the burden is on Mr. Marsh.

When we get to the 1972 rezoning, I don't know of any cases since that 1998 decision. I know from personal experience when that case was first handed down, I have a general practice of law and I do traffic and criminal defense work as well as a number of other things. I know a lot of attorneys got all excited about that case because frequently people, DUIs are charged under a local ordinance because the locality can then pocket the fines and so forth. Everybody called into the Virginia Lawyer's Weekly and got a fax and a copy of the Town of Madison decision thinking that would be a productive avenue to challenge a DUI charge on behalf of a client, trying to help the client out. It became quickly apparent in Chesterfield County that the Courts in this County as far as I know, I don't know of any other courts that have not applied that decision prospectively.

I think Mr. Arzt's argument that the Virginia Supreme Court, they don't have the power to write out a requirement of the Virginia Constitution and I was troubled by that too but you're faced with the practical reality of the fact that they get the final say and they said it. I think it's for them to be, I think you have to convince them that they didn't have the power to do what they did. They stated it and I think it's binding

on courts throughout the Commonwealth. As far as I know and Mr. Parthemos mentioned maybe one lower court somewhere in the State did not follow that but I know from personal experience that that's certainly in the minority and especially in this Circuit. So I believe that the '72 Ordinance would be upheld by the Court.

I think the bottom line as far as in my mind is that to the extent the original Ordinance rezoning, obviously they rezoned a large tract of land to the extent that we can't tell exactly where it is, I think the burden is on Mr. Marsh to show his was affected the way that he now states and the way that he now asserts. I think the best evidence that we have shows that it wasn't. To the extent that we can't tell what happened I think he's stuck with agricultural zoning because that's what it was to start with and unless it can be shown that it was rezoned in some other fashion, I think that's where he stays.

So my motion would be Mr. Chairman, in Case Number 00AN0258 that we uphold the decision of the Director of Planning for the reasons I've stated.

MR. MOORE: Mr. Chairman, I second it but I'd like to make three brief comments to support my second. One, I do not believe that the 1972 minutes are a Constitutional violation. I think there's a case of bad minutes and I think the people who attended the meeting could be brought to verify what they said and therefore to validate the minutes. I believe the way I read it and not being an attorney but I read the Ford versus Madison case and I believe it is prospective and I think it covers issues like that. I know from prior cases that we have to give great weight to decisions of the Director of Planning. I'd have to believe that he is plainly or clearly wrong to not support his decision. So I would second the motion for those reasons.

MR. BIGGS: Thank you.

MR. DANIELS: Mr. Chairman, it's been suggested by the able secretary here and it might be a good point from a housekeeping standpoint, that probably should have been brought down in two motions. So I'd like to modify mo motion. I move that we, my first motion would be that in case 00AN0258 that we uphold the decision of the Director of Planning regarding Section 19.1.6 of the Zoning Ordinance relative to operations of an airport in an agricultural A district without an approved conditional use permit.

MR. BIGGS: Alright, do I hear a second?

MR. MOORE: Second.

MR. BIGGS: Motion is made and seconded. All in favor, alright.

MR. DANIELS: Secondly, Mr. Chairman I move that we also in case number 00AN0258 that we uphold the decision of the Director of Planning that the subject property is zoned agricultural instead of industrial for the conditional use of operating an airport.

MR. MOORE: Second.

MR. BIGGS: The motion is seconded. All in favor raise your hands please? Motion carried. Gentlemen, thank you for your time.

PROCEEDINGS CONCLUDED.

h. Circuit Court Letter Ruling Before Hearing and Final Argument

COMMONWEALTH OF VIRGINIA
Twelfth Judicial Circuit
July 3, 2001

Stylian P. Parthemos, Esq.
Senior Assistant County Attorney
County of Chesterfield
P. O. Box 40
Chesterfield, VA 23232

Lee Robert Arzt, Esq.
8001 Franklin Farms Drive
Richmond, VA 23229

Re: *Walter W. Marsh and Charlotte D. Marsh v. Board of Zoning Appeals of Chesterfield County*
CL00W-776

Dear Counsel:

This cause came on for hearing on March 8, 2001 on a writ of certiorari to the Chesterfield County Board of Zoning Appeals and on the appellant's motion to take new evidence and have discovery. Although the March 8, 2001 hearing was noticed and briefed only on the appellant's motion to take new evidence argument at the hearing was sufficiently board to fully decide this matter on its merits. Therefore, upon the arguments of counsel, counsel's memoranda and the authority cited therein, and a review of the record below the Court now renders the following opinion.

Facts

The appellants own two parcels of land which border the Chesterfield County Airport. Believing that the property had been zoned for airport use when the county airport was zoned in 1969 the appellants constructed a landing strip for their ultra-light aircraft and related structures. Neighbors complained about the appellants' use of their landing strip to the Chesterfield County Planning Commission. The Planning Commission determined that the appellant's property was zoned for agricultural use and that the appellant was operating an illegal airport under the county zoning ordinance. The Planning Commission issued a notice of zoning violation on April 7, 2000. On May 16, 2000 the appellants appealed the notice of violation to the Board of Zoning Appeals under Virginia Code sec. 15.2-2311. The parties stipulate that the appellants are operating an airport as defined by the zoning ordinance.

On appeal before the Board of Zoning Appeals the appellants argued that there were two conflicting sets of zoning maps which purport to represent the zoning ordinance of 1969 and that the better set of maps indicate that the subject parcels were part of an area zoned for airport use. The appellants also argued that the county's rezoning of 1971 failed to modify the zoning of the subject parcels because the 1972 ordinance was not legally adopted under the procedures mandated by Article VII Section 7 of the Virginia Constitution and that even if the ordinance is valid the appellants benefit from a conditional use permit from the 1969 zoning.

The BZA rejected these arguments and held that the subject parcels were not zoned for airport use. The appellants now argue before this Court that the BZA violated their due process rights by depriving them of the right to cross examine witnesses and for

refusing to consider the second set of zoning maps from 1969.

Standard of Review

This action was brought by writ of certiorari to the BZA under Virginia Code sec. 15.2-2314. The scope of this Court's authority to review decisions of the BZA under sec. 15.2-2314 has been clearly stated by the Supreme Court. "A proceeding on a writ of certiorari is not a trial de novo. Rather, the trial court's review is limited to determining whether the decision of the board of zoning appeals is plainly wrong or based on erroneous principles of law." Further, review by certiorari, "does not authorize a trial court to rule on the validity or constitutionality of legislation underlying a board f zoning appeals decision."

Given this narrow standard, this Court can look only to whether the law and the facts support the decision of the BZA. It is a result oriented standard. The appellants' claim that they were denied due process before the BZA is not, therefore, reviewable in this Court in a proceeding under sec. 15.2-2314. Neither does this Court need to reach these issues to dispose of this case.

The 1972 Zoning Ordinance

The appellant concedes that if the 1972 county wide zoning ordinance is valid the subject parcels would be zoned agricultural. If the ordinance is held valid they rely upon the argument that the 1969 zoning granted a conditional use permit that ran with the land and which survived any subsequent zoning ordinance. As cited above, under *Board of Zoning Appeals of James City County v. University Square Associates* this court may not review the validity of the underlying zoning legislation under a sec. 15.2-2314

proceeding. The Court, therefore, declines to review the validity of the 1972 ordinance.

The second issue is if the 1969 zoning ordinance granted a conditional use permit to use the subject parcels as an airport whether it survived the 1972 rezoning. The Supreme Court stated the rule relating to property rights and changes in zoning in *Board of Zoning Appeals of Bland County v. Caselin Systems, Inc.*

> Privately held land is subject to applicable local zoning ordinances whether enacted before or after the property was acquired. Generally, landowners have no property right in anticipated uses of their land since they have no vested property right in the continuation of the land's existing zoning status.

Private landowners can acquire a vested right in particular use of their property if they meet two requirements. First, the landowner must, "identify a significant official governmental act that is manifested by the issuance of a permit or other approval authorizing the landowner to conduct a use on his property that otherwise would not have been allowed." Second, the landowner must establish, "that he has diligently pursued the use authorized by the government permit or approval and incurred substantial expense in good faith *prior to the change in zoning.*" (emphasis added)

Even if the appellants' parcels had airport zoning prior to the 1972 zoning ordinance in satisfaction of the first requirement of the test they fail to demonstrate the second. The record reveals that the appellants did not acquire the subject parcels until about 1986 and that it was the appellants that constructed the airport on those parcels. Any reliance

upon an airport zoning classification of the subject parcels came well after the 1972 zoning ordinance clearly zoned the parcels agricultural. The Court therefore find that no interest in a conditional use permit or airport zoning vested in the property.

Since any conditional use permit did not survive the 1972 zoning ordinance it is unnecessary to reach the question of the scope of the 1969 zoning ordinance or to review the procedures at the BZA hearing which relate to the 1969 ordinance.

Motion to Take New Evidence

A trial court is authorized to take new evidence in a proceeding brought under sec. 15.2-2314 when it is, "necessary for the proper disposition of the matter." As this case could be decided on the law and the facts already in the record the appellants' motion to take new evidence and have discovery is denied.

Conclusion

The Court finds that the decision of the Board of Zoning Appeals applied correct principles of law and that it was supported by the facts. Accordingly, the decision of the Board of Zoning Appeals is affirmed.

Counsel for the Respondent is directed to prepare an order consistent with and incorporating this opinion and forward it to counsel for the appellant for endorsement and filing with the Court.

Very truly yours,

/s/ T. J. Hauler

T. J. Hauler
Judge

i. Circuit Court Ruling After Hearing and Final Argument

VIRGINIA:

IN THE CIRCUIT COURT OF THE
COUNTY OF CHESTERFIELD

WALTER W. MARSH, et. ux.

Appellants

v. Case #CL00W-776

BOARD OF ZONING APPEALS
OF CHESTERFIELD COUNTY, et. al.

Appellees

FINAL ORDER

CAME THE PARTIES on March 8, 2001, by counsel, on a writ of certiorari pursuant to Va. Code Section 15.2-2314 whereby Appellants seek review of the July 5, 2000 decision of the Board of Zoning Appeals of Chesterfield County ("BZA") and, also, on Appellants' motion to take new evidence and have discovery. The BZA's decision upheld a Notice Of Zoning Violation dated April 7, 2000 from the County's Planning Director alleging that the Appellants were operating an illegal airport under the County's zoning ordinance and the Director's May 25, 2000 determination that the subject property owned by the Appellants is zoned agricultural (A).

UPON CONSIDERATION WHEREOF, having reviewed the complete record of the BZA submitted in response to the write of certiorari entered on October 13, 2000, and having heard argument of counsel, the Court DENIES the Appellants' motion to take new

evidence and have discovery. Further, the Court finds for the reasons stated in the Court's letter opinion dated July 3, 2001 that the decision of the BZA does not apply erroneous principles of law, does not violate the purpose and intent of the zoning ordinance, and is not plainly wrong.

Accordingly, it is ORDERED that the decision of the BZA is affirmed. And it appearing that no further action is required, this case is DISMISSED with prejudice and ORDERED that it be stricken from the docket and placed among the ended causes of the Court.

The Appellants, by counsel, objected to the ruling of the Court for the reasons stated in their petition for writ of certiorari and orally on March 8, 2001.

The Clerk shall send a certified copy of this Final Order, as entered, to counsel of record.

ENTER: / /

_____s/_____
Judge

We ask for this:

_____

Steven L. Micas
County Attorney
Stylian P. Parthemos
Senior Assistant County Attorney
David W. Robinson
Assistant County Attorney
P. O. Box 40
Chesterfield, Virginia 23832
(804) 748-1492
Counsel for Chesterfield County
And Board of Zoning Appeals

Seen and Objected To:

_____

Lee Robert Arzt, Esquire
The Koger Building
Suite 208
8001 Franklin Farms Drive
Richmond, VA 23229
Counsel for Appellants
(804) 282-9722

j. Virginia Supreme Court Ruling Denying Writ

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 16th *day of* September, 2002.

Walter W. Marsh, et. al., Appellants,

against Record No. 021290
Circuit Court No. CL00W-776

Board of Zoning Appeals of
Chesterfield County, et. al. Appellees

From the Circuit Court of Chesterfield County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:

David B. Beach, Clerk

By:

Deputy Clerk

k. Virginia Supreme Court Ruling Denying Request For Rehearing

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 1st *day of* November, 2002.

Walter W. Marsh, et. al., Appellants,

against Record No. 021290
Circuit Court No. CL00W-776

Board of Zoning Appeals of
Chesterfield County, et. al. Appellees

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 16th day of September, 2002 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:

/s/ David B. Beach
Clerk

1. Proffer of New Evidence:

a. Showing unofficial pencil colored drawing in conflict with second set unofficial penciled drawings

b. Study by Petitioner that shows that during relative time period the County never referred to a whole parcel when it mean to refer to only a portion of the parcel.

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

WALTER W. MARSH, et. ux.

Appellants

Case No. CL00W-776

v.

CHESTERFIELD COUNTY
BOARD OF ZONING APPEALS, et. al.

Appellees.

MOTIONS AND PROFFER

Now comes the plaintiff herein and for their Motions and Proffer state as follows:

1. The only hearing conducted in this matter was March 8, 2001, which motion was brought by the plaintiff for the express and sole purpose of having discovery of the defendant.

2. While the scope of the colloque at that hearing with the court went far beyond the expected scope of the plaintiff's noticed hearing, there never was a full or proper hearing where the full merits of the plaintiff's case was presented.

3. The sole ruling that may properly result from the hearing that the plaintiff set to get discovery, should be restricted to the issue of discovery.

4. The plaintiff asserts that the Court's letter opinion, suggesting a final order as though the matter was heard on the merits is a denial of due process, both federal and state.

WHEREFORE does your plaintiff move that the court reconsider its letter opinion of July 3, 2001, allow discovery and permit a full on the merits hearing in this matter.

PROFFER AND STATEMENT

NOW COMES the plaintiff in this action and states as follows for its proffer:

1. That from the notices required by law for the rezoning and use action, concerning the real estate that is the subject of this litigation, it is obvious that the entire parcel was listed in the rezoning and use action, ***and it is also obvious that the notices do not list the subject parcel as one of those whose owners, were entitled to receive notice of the action as a neighboring property or property owner.***

The aforementioned facts were not presented at the hearing because it was not a hearing on the merits of the main issues in controversy, and there never was an opportunity to make such a presentation due to the lack of a full hearing on the merits. Without discovery, and now without a hearing of the case in chief, there was no opportunity for the plaintiff to state its case in full.

The plaintiff cannot know how much more evidence would have been addressed were plaintiff permitted the requested discovery.

The plaintiff respectfully objects and excepts to the procedures leading to the entry of a final order.

WALTER W. MARSH, et. ux.

S/ lra

By_____
Counsel

Lee Robert Arzt, Esquire, VSB#13192
8001 Franklin Farms Drive, #208
Richmond, VA 23229
(804) 282-9722
(804) 282-1048 fax
lit:Marsh Zone Mot to Rehear

CERTIFICATE

I hereby certify that a copy of the foregoing was mailed to Steven L. Micas, Esquire and Stylian P. Parthemos, Chesterfield County Attorney's Office, P. O. Box 40, Chesterfield, VA, 23832, this _____ day of September, 2001.

S/lra

Lee Robert Arzt

m. Virginia Code § 15.2-2314

§ 15.2-2314. Certiorari to review decision of board.

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition specifying the grounds on which aggrieved within thirty days after the final decision of the board.

Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board, unless it shall appear to the court that it acted in bad faith or with malice in making the decision appealed from. In the event the decision of the board is affirmed and the court finds that the appeal was frivolous, the court may order the person or persons who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the return, the board may request that the court hear the matter on the question of whether the appeal was frivolous.

(Code 1950, §§ 15-834 through 15-839, 15-850, 15-958.11; 1950, p. 176; 1962, c. 407, § 15.1-497; 1975, c. 641; 1988, c. 856; 1994, c. 705; 1996, c. 450; 1997, c. 587; 2001, c. 422.)

n. Virginia Code § 15.2-2312

§ 15.2-2312. Procedure on appeal.

The board shall fix a reasonable time for the hearing of an application or appeal, give public notice thereof as well as due notice to the parties in interest and make its decision within ninety days of the filing of the application or appeal. In exercising its powers the board may reverse or affirm, wholly or partly, or may modify, an order, requirement, decision or determination appealed from. The concurring vote of a majority of the membership of the board shall be necessary to reverse any order, requirement, decision or determination of an administrative officer or to decide in favor of the applicant on any matter upon which it is required to pass under the ordinance or to effect any variance from the ordinance. The board shall keep minutes of its proceedings and other official actions which shall be filed in the office of the board and shall be public records. The chairman of the board, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses.

(1975, c. 521, § 15.1-496.2; 1983, c. 444; 1986, c. 483; 1997, c. 587.)

o. Virginia Code § 2.2-4000, Administrative Process Act, especially §§'s 2.2-4019 & 2.2-4020.

§ 2.2-4019. Informal fact finding proceedings.

A. Agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation

procedures shall include rights of parties to the case to (i) have reasonable notice thereof, (ii) appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer for the informal presentation of factual data, argument, or proof in connection with any case, (iii) have notice of any contrary fact basis or information in the possession of the agency that can be relied upon in making an adverse decision, (iv) receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.

B. Agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent.

(1975, c. 503, § 9-6.14:11; 1986, c. 615; 1989, c. 601; 1993, c. 898; 1994, c. 748; 1995, c. 398; 2001, c. 844.)

§ 2.2-4020. Formal hearings; litigated issues.

A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 2.2-4019 have not been had or have failed to dispose of a case by consent.

B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof, (ii) basic law under which the agency contemplates its

possible exercise of authority, and (iii) matters of fact and law asserted or questioned by the agency. Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 2.2-4019.

C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F of § 2.2-4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record

(i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto.

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

(1975, c. 503, § 9-6.14:12; 1986, c. 615; 1991, c. 584; 1993, c. 898; 1995, c. 398; 2001, c. 844.)

p. Petitioners' Brief for New Evidence and Discovery at Circuit Court.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

WALTER W. MARSH, and CHARLOTTE D. MARSH,
Petitioners,

v.	**Appeal No.**
BOARD OF ZONING APPEALS OF CHESTERFIELD COUNTY	
and	
COUNTY OF CHESTERFIELD	
Respondents	

APPELLANTS BRIEF IN SUPPORT OF MOTION TO TAKE NEW EVIDENCE & HAVE DISCOVERY.

Background

The petitioners, the Marshes own two parcels of land bordering on Chesterfield Airport, which were bought some years ago. Walter Marsh built a building on one of the lots that has been used as an agricultural building. Later, based on improvements, he sought to have the property classified as a residence, all before he did some research and concluded that the property had at the time of the creation of Chesterfield Airport been legally rezoned industrial and granted a use permit to operate an airport.

Mr. Marsh is interested in aviation, and believing it to be his right, constructed a grass airstrip and commenced sporadic, recreational use of the strip for ultra-light and Short Take Off and Landing aircraft, (with an informal control tower). This resulted in the County issuing a couple of letters noticing him of violations for operating an illegal airport. These violations could be pursued by the

County criminally. The communications with the County culminated in the issuance of two ruling letters from the Chesterfield County Planner, finding that Marsh did not have the industrial zoning or the use permit to operate an airport, which required an appeal to the Board of Zoning Appeals within 30 days in order for Mr. Marsh to keep his rights. Mr. Marsh then brought his appeal and had his hearing. This appeal to the Circuit Court is based upon serious constitutional due process errors at the Board of Zoning Appeals as well as issues having to do with plainly wrong findings of fact.

This brief is limited in scope to dealing with whether or not new evidence, and discovery should be permitted at the Circuit Court appeal of this matter, which should be essentially a trial *de novo*[1], because the errors cannot be cured in a proceeding below.

Introduction

The petitioners approach this subject with all due respect to the County of Chesterfield, ("Chesterfield"), and the Board of Zoning Appeals, (the "Board"), who had to adjudicate and endure this extremely hotly contested matter, recognizing that the petitioner as a land developer has to live and work together with the County and possibly the Board in the future.

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[1] Part of the constitutional requirement of minimal due process as described by the U.S. Supreme Court, ***infra,*** requires that there be an impartial hearing officer. In the Board hearing from which petitions appeal, the hearing officer permitted the Counsel for the County to rule on the petitioners' repeated request for the right to have cross-examination without comment, basically a continuation of the denial of this right. Transcript, page 27, line 17 ***et seq.***

Notwithstanding this, the petitioners are forced to say that the facts presented by the County to the Board were unsworn, untested by any fair standard of due process due to the unwillingness of the Board to impose minimal standards of due process, and plainly untrue. The lack of due process standards violates the laws of the Commonwealth of Virginia, (the incorrect application of the law), and makes adequate grounds for appeal on procedural violations alone. The lack of minimal due process permitted the type of hearing where pure (and significantly, untrue) speculation held sway over official records of fact and law, leading to plainly wrong factual findings, leaving the petitioners no relief but to appeal to this Court.

First, the petitioners will show this Court how the facts produced at the Board hearing are fatally flawed and easily proven plainly wrong and then petitioners will show how the lack of minimal due process standards at the Board created the situation leading to their plainly wrong findings, making it clear that the true facts of this case need to be adduced anew and tested by a full and fair legal process.

A. The Core of the County's Argument that the Subject Land was Never Rezoned Industrial with a Land Use Permit to operate an Airport when the Airport was created, was Based on Two Alleged Facts, 1) That the County's Color Pencil Zoning Maps were the Best Evidence, or Best Record of what Lands were Rezoned and Granted a Use Permit, and 2) That the Board of Supervisors Official Records during the time period indicate that the mention of a parcel in a rezoning or use permit application or ordinance did not necessarily mean that the entire parcel was affected by the action.

Since these were the two main legs of the County's case, presented as the basis for the County's argument that the official records of the Board of Supervisors clearly granting industrial rezoning, and the use permit to operate an airport to the petitioner's parcels should be ignored, the petitioners commence with this issue.

1). At the time the County presented the Color Pencil Zoning Maps, it was unaware that there are *two sets* of County Color Pencil Zoning maps, both in the possession of the County, and *they do not agree with each other.*

Petitioners stress that they do not believe that the County was consciously misrepresenting to the Board that the set of County Zoning Maps that the County was presenting was the only set and that it represented the best evidence of rezoning, etc., but it is beyond controversy that the County possesses not one but TWO SETS OF COLOR PENCIL ZONING MAPS that are supposed to be identical to each other. This means that the information contained on each set of drawings is supposed to be the same, but that they are in fact different, and they are different in their dealing with the rezoning case creating Chesterfield Airport.

In particular the Zoning Maps are different with regard to ***the amount of land that they show was rezoned in the creation of Chesterfield Airport!***

For the ease of assimilation by the Court the petitioners have made a full color copy of the so called Color Pencil Zoning Map of the subject property and which includes the lands which became the Airport, introduced by the County at the Board hearing and it

is folded up and included with this brief as Exhibit "1-A," and is made a part hereof. The purpose here is to show this Zoning Map as it was shown to the Board at the hearing, and then to show the Court the same drawing from the parallel second set, which existed on the same shelf in the County offices, purporting to be the same thing, but which contains different information.

Therefore we attach as Exhibit "1-B," a copy, in full color of the purported same or parallel page from the second set of Color Pencil County Zoning Maps. To distinguish the difference in the amount of land alleged to be affected by the Airport rezoning case, we have circled the same area in both maps showing where on 1-B, there are more lands alleged to have been included in Airport rezoning than there were in Exhibit 1-A, alleged by the County to be the ***ne plus ultra***, provider of information about the amount of land included in the Airport rezoning. If the County Zoning Maps are to be respected above the written minutes and ordinances of the Board of Supervisors, then how do you explain the fact that the County's Zoning Maps themselves do not agree. The answer is that the County Zoning Maps are not a better source than the official written records of the meetings of the Board of Supervisors and the County's Ordinances.

It is instructive, but not binding, to view the current zoning ordinance of the County where the Board of Supervisors have addressed what to do when the Zoning Maps conflict with the Ordinance:

> **§19-43. Maps.**
>
> **(a) . . . if there is an inconsistency between any information shown on the zoning district maps and any decision made by the board of supervisors or board of zoning appeals after January 1,**

1973, then the decision of the board of supervisors or board of zoning appeals shall govern.

This is not binding in the case at bar because this relates to matters under the zoning ordinance passed in 1973 where the zoning maps became a part of the ordinance itself. (". . .**these maps are hereby adopted and made a part of this chapter." §19-43. (a).** What it does show is the preference that the written language of the minutes and ordinances of the County over the maps which are less formal and which are more subject to error as they are not directly controlled by the Board of Supervisors, but which are colored in by employees of the County who are not signatory to their work, at a time which is unknown, and with little documentation.

The petitioners analogize these zoning maps to County tax maps which show the relationship between parcels and give the County officials and citizens a kind of key as to where various parcels are and where they can find the tax records, but which are not seen as accurate representations the true legal descriptions or depictions of the individual properties. Similarly, the zoning maps have case numbers and information that help County employees and citizens figure out what zoning actions happened to a parcel and when, in a general sort of way. Like tax maps though, no one ever tries to get a metes and bounds description from them. Tax maps are notoriously inaccurate for precise information like that. You just look up the tax bill numbers from the tax maps just as you can look up the zoning case from the zoning maps; nothing more is provided.

Because the two sets of old zoning maps clearly contain conflicting information, it would be unwise in the extreme to say that they should be looked to as

better evidence than the words contained in the zoning/use application and ordinance. Clearly the written records of the Board of Supervisors ought to prevail over the zoning maps.

Because there were no discovery or disclosure rules governing the proceedings, and even worse, no opportunity to confront the witnesses who put on but one on the twin sets of County zoning maps, there was no opportunity for the petitioners or the Board to know how valueless the evidence was that the County was providing. The County and therefore all at the hearing could not know that a second set of drawings existed in the County offices on the same shelf. The facts are that two sets of maps exist and contain conflicting information about what lands were included in the rezoning, and that should put to rest any doubt that these zoning maps are not the best source of information about what lands were included in the rezoning, and that the written records should prevail.

Clearly, new evidence needs to be adduced on this point.

2). There is No Support for the County's Allegation that the Board of Supervisors at the Time of the Airport Rezoning/Use Case did not Act Consistently and Accurately in Specifying When Only a Part of a Parcel was to be Rezoned or Granted a Use Permit.

The second major argument of the County at the hearing was that at the time of the Airport rezoning/use case, that the Board of Supervisors were not consistent in specifying in their official written records when only a part of a parcel was to be included in a rezoning or use permit case. Please see

the transcript of the Board hearing at Page 12, line 13, *et seq.*; Page 27; Page 31, line 21.

> **(From Transcript, page 31, line 21*et seq.* with the County Planner speaking)**
>
> **"...and the answer was no, the Board was not, the County was not consistent at that time"**

This was introduced by the County Planner to show that the written official records were not to be trusted, in favor of trusting the County zoning maps, which the Board and witness felt were much more trustworthy. Please see the Transcript at page 33, where the County Planner is saying that it was unlikely that a mistake could be made on a map like the zoning maps.

The Board Members in discussing their decision to deny the appeal of the petitioners mentioned this policy of inconsistency in the written records of the Board of Supervisors, in placing the color pencil zoning map over the language of the application and zoning/use ordinance. Please see transcript page 84, line 16 *et. seq.*

> **"We've heard from Mr. Jacobson that his research shows that back in the old days when they were just proposing to affect a portion of the tax map they didn't really indicate it and in some cases they just referenced the entire map to identify the parcels that were affected . . . I don't think that's to say that because there's no consistency I don't think we can draw any conclusions and we can assume that the entire parcel was, each of those tax map**

parcels was rezoned or was affected by the action taken by the Board of Supervisors. . . . I think the zoning map that's in the custody of the agency for the County that are charged with the duty in determining and enforcing the Zoning Ordinance is the best evidence we have here to tell us exactly what was rezoned."

To show that the County Planner was plainly wrong and in error is saying that the official written records were inaccurate and that they did not accurately indicate when only a portion of a parcel was to be rezoned, etc. and that the zoning maps were the best record, the petitioners attach (proffer) portions of Volumes 17 and 18 of the Chesterfield County Board of Supervisor's Minutes as Exhibits "2-A" and "2-B" respectively. dating from about a year before to a year after the Airport case which was dated September 24, 1969.

The petitioners cannot know without discovery or maybe the right to cross-examine, the basis was for the County to allege that they conducted a study of the cases surrounding in time of the Airport case and they found the Board of Supervisors to be inconsistent in stating when they were trying to rezone a part of a parcel, so the petitioners will not engage in conjecture.

What the petitioners have done is to select no less than thirty-five (35) percent of all of the cases occurring during this time period and analyze each selected case before the Board of Supervisors starting about a year before the Airport case in Volume 17 and about a year after the Airport into Volume 18. Mr. Marsh, has listed each case on a table marked Exhibit 3, included herewith, and noted each case where the Board of Supervisors official written records state that the rezoning case is to affect a ***part of a parcel,*** to

show that the Board of Supervisors did in fact make such distinctions in its written records. In each of the cases selected for study, Mr. Marsh compared the rezoning/use records to see whether the reference was to whole parcels or partial parcels and compared that reference to the County pencil colored zoning maps.

Mr. Marsh states under oath, in Exhibit 4, included herewith, that he has found no instances where there is a discrepancy between the official written records and the County color pencil zoning maps, other than the Airport case. When the official written records mention a parcel without saying that they are affecting a part of a parcel, the entire parcel was colored in on the zoning maps. When the official written records said that they were only affecting a portion of a parcel, then only a portion of the parcel was colored in on the zoning maps. During the period in question, other than the Airport case, there was no other case where a parcel was mentioned and only a portion of the parcel was colored in on the zoning maps, among the no less than 35% of the existing cases.

The sample indicates that there were no mistakes made by the Board of Supervisors during the time that the Mr. Marsh reviewed. In the Airport case the minutes and written records are fine, only in the two zoning maps are there discrepancies, and that would mean to the petitioners that these maps should be discounted from the analysis. Among the cases that Mr. Marsh has reviewed, there is no basis for finding that the County Board of Supervisors records were was careless or inconsistent in their official written records regarding whether a whole or part of a parcel was effected by an action taken by the Board of Supervisors.

Just before closing this argument the Mr. Marsh states that were he to have found discrepancies, between the zoning maps and the written records, we would argue that the written records are the best evidence because they are the records most under the control of the Board of Supervisors, where the maps are filled in later by an unspecified person, not a member of the Board of Supervisors, a person who was not necessarily at the meetings and who could easily be influenced by facts occurring after the meeting.

The second plank upon which the County rested its main case about the Airport rezoning is no more valid than the first.

B. The Most Minimal Standards of Due Process Were Not Observed by the Board in the Hearing Below, Depriving the Petitioners of Their Constitutional Right to Due Process and Contributed Greatly to the Misapplication of Law and Plainly Wrong Conclusions of Fact.

While the Board may not be an agency like many others, and while it is acknowledged that it has a number of different functions, such as acting as a citizen check against the unfair imposition of harsh zoning laws, etc; it also has the function of an adjudicative body, as it had in the case at bar. When it acts as an adjudicator, it must act in a way that gives the parties both a full and fair hearing, observing the norms of due process. The extremely informal and unwritten rules that it uses in cases for the relief of citizens who claim to be over burdened with regulations do not suffice where the Board is acting as an adjudicator.

The petitioners in the case at bar were about to lose their rights to claim industrial zoning and a use permit to operate an airport on their land. These are substantial property rights, worth a considerable amount. Mr. Marsh had built an airstrip based on his perceived rights in reliance. American law just does not permit substantial rights to be taken away without due process.

> **Procedural due process has been said to require that before an individual is deprived of any significant property interest he must be granted an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. *Williams v. Virginia Electric & Power Co.*, 18 Va. App. 569, 576-77, 445 S. E. 2d 693, 698 (quoting *James v. Arlington Bd. of Supervisors*, 226 Va. 284, 289-90; 307 S. E. 2d 900, 903, (1983). While the requirements in administrative proceedings may be more relaxed, "the Commission must use procedures that 'afford the parties minimal due process safeguards.'" *WLR Foods, Inc. v. Cardosa*, 26 Va. App. 220, 227, 494 S.E. 2d 147, 150 (1997), quoting *Sergio's Pizza v. Soncini*, 1 Va. App. 370, 376; 339 S.E. 2d 204,207 (1986); all quoting *Georgia Pacific Corp. v. Davis*, 1998 Va. App. Lexis 422.**

The United States Supreme Court specified the minimum requirements of constitutional due process which must attend administrative hearings, **the right to confront adverse witnesses, and present one's own evidence, and an impartial decision maker. *Goldberg v. Kelly*, 397 U.S. 254 (1970)**; and this case is followed in Virginia, in ***Hladys v.***

***Commonwealth*, 235 Va. 145, 366 S.E. 2d 98 (1988).**

§15.2-2312 of the Code of Virginia grants the Board the discretion to swear in and subpoena witness, but that discretion cannot be used in a way that it fundamentally denies the parties the opportunity to have a full and fair or at lease a minimally fair hearing. While it might be argued in some of the Board's cases that swearing and subpoenaing witnesses are not necessary, where as in the case at bar, there are substantive issues for adjudication, with the County on one side and a private citizen on the other, and the citizen asks that witnesses be subpoenaed and sworn, (please see pp. 42, line 15 and lines 20-21 of the transcript), petitioners argue that the failure to grant these requests are an abuse of discretion.

Whether or not the Board is such an administrative body as to be directly subject to the Virginia Administrative Process Act, §9-6.14:1 *et. seq.*, the Act establishes the norms for proper administrative procedure in Virginia. Since this was an adjudicative hearing of disputed rights we shall focus on the section of the Act that deal with cases like the case at bar. §9-6.14:11. deals with informal fact finding. In the case at bar, this procedure might be analogous to the Director of Planning's letter decision that the petitioners did not have the zoning or use permit that they alleged. Even at this stage the parties have rights,

> **A. . . . Such conference-consultation procedures include rights of parties . . . (iii) to have reasonable notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision,**

B. Agencies may, in their decisions, rely upon public data, documents or information *only* [emphasis added] when agencies have provided all parties with advance notice of an intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent.

Never were the petitioners granted any of these rights. The materials that were used to detract from the Board of Supervisor's official written records were never noticed to the petitioners. No study of the written records of the County was ever produced or noticed. All this was to be a surprise at the hearing, and then no right even to cross examine the witness testifying to this previously unknown data and the fact that it would be used in the hearing.

While I do not feel that the Board was conducting a hearing analogous to an informal hearing. a review of what rights the Virginia legislature gave to parties in a lesser situation will emphasize how poorly the petitioners were treated in the hearing at the Board. The petitioners had no notice of the factual basis for the possible adverse decision of the Board. The petitioners had no way to know what public data, documents or information was to be considered. In fact the petitioners believe that there is a procedure whereby the County gets to apprise the Board in advance of its case and plans, where the citizen gets no invitation at all.

When informal conferences don't work and the matter is to be litigated, a statutory procedure more in line with the appeal to the Board, §9-6.14:12. Litigated Issues., applies.

> **. . . B. Parties to such formal proceedings shall be given reasonable notice of . . . (ii) the basic law or laws under which the agency contemplates its possible exercise of authority, and (iii) the matters of fact and law asserted or questioned by the agency. . . .**
>
> **C. In all such formal proceedings the parties shall be entitled to . . .submit oral and documentary evidence and rebuttal proofs, to conduct such cross examination as may elicit a full and fair disclosure of the facts, . . . The presiding officers at such proceedings are empowered to (i) administer oaths and affirmation, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal or cross-examination, rule upon offers of proof. and oversee an accurate verbatim recording of the evidence, . . .**
>
> **D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefore. . . .**

In the case at bar, at the hearing before the Board, the petitioners were never told about the matters of fact which were going to be asserted, instead they were greeted with insinuations about prior conduct of which they had no notice, (Transcript page 9, the tree cutting issue); Our objection to the irrelevant issue attempting to poison the well against the petitioners, did not stop the County from bringing this up again. Please see Transcript page 22-27. Petitioners were denied the right to have witnesses subpoenaed, (Transcript page 42, line 15); they were denied the right to cross examine or even question the

County's witnesses, (Transcript pages 20 and 21, page 27 line 17,); no oaths were administered even though the petitioners requested this, (Transcript page 42, line20-21, there are also letters in the file asking for this before the hearing.); the Board refused to exclude poisonous references to irrelevant matters such as the cutting of trees by some unknown person(s), all of the County's evidence was insubstantial but so much as the test of an oath was not afforded petitioners. In the end no rebuttal was permitted petitioners. This was not close to a full and fair hearing, and there is no way that the petitioners should be forced to go back to the Board to have this treatment again.

The hearing before the Board was fatally defective and this Court should permit the petitioners to submit all of the facts anew, with full discovery and apply the appropriate law.

C. The Rights Being Denied and the Laws Being Enforced by the Board have a Criminal Aspect to Them In the Event that the Petitioners Would Continue to Exercise their Alleged Rights in Violation of the Board's Ruling which Raises the Standard of Due Process over that where merely Private Rights are Concerned.

The rights which Mr. Marsh exercised to operate an airport which were the basis for the letter actions by the County Planner and the appeal to the Board, would become a criminal matter prosecuted by the County Attorney in the event that the petitioner continued to operate an airport after an adverse ruling. This nexus with criminal law enforcement ought to raise the due process requirements in a hearing to strip the petitioner of these rights forever. Instead we have the very weak showing of due process in a proceeding that is not designed to grant a full and

fair hearing at all. There is no need to reiterate the plain reasons for all this

Mr. Marsh includes as Exhibit 4, attached and made a part hereof, his affidavit, attesting to the fact that he collected the documents from the County and drafted the analysis that is now Exhibit 3, and that to the best of his knowledge and belief that the statements of fact that are made in this brief and in those exhibits are true.

Wherefore do your petitioners respectfully submit this brief in support of their motion to permit new evidence and discovery to be taken to eliminate the due process limitations of the prior proceeding and to wipe away the erroneous facts which were albeit innocently presented, very unfair and untrue and that the petitioners have the opportunity to present their case in full before this Court.

Walter W. Marsh
S/Ira

_____

By Counsel

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C E R T F I C A T E

This is to certify that on this 21st day of February 2001, that I did deliver by hand a copy of the foregoing to Stylian P. Parthemos, Esquire, counsel for the Board of Zoning Appeals of Chesterfield County and the County of Chesterfield, at the County of

Chesterfield County Attorney Office, 9901 Lori Road, Room 503, Chesterfield, Virginia, 23832.

S/lra

Lee Robert Arzt

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

WALTER W. MARSH, and CHARLOTTE D. MARSH, Petitioners,	
v.	**Appeal No. CL00W-776**
BOARD OF ZONING APPEALS OF CHESTERFIELD COUNTY	
and	
COUNTY OF CHESTERFIELD	
Respondents	

MARSH'S WRITTEN FINAL ARGUMENT

Marsh appears again by counsel, for his final argument in this matter, and for the purposes of the record submits this document to preserve the points made for the convenience of the Court.

With all due respect to the Court and Counsel for the County of Chesterfield, there

appears to be no issue in this matter upon which we agree, except perhaps that this has been a hotly contested case and that emotions have run high. If in pursuing the landowner's rights anyone has been offended, we humbly apologize, as there is no wish to offend, but only to do what is necessary to preserve and pursue the rights of the landowners. It is the duty of counsel to point out the areas where there is disagreement with the proceedings below, or in the proceedings in this Court, but that this should not be taken as enmity or lack of respect.

It is the landowner's position that they have set out the correct law and interpretation of facts in the legal documents previously submitted, including without limitation, the Petition for Writ of Certiorari, and in the Appellants [Marsh's] Brief in Support of Motion to take New Evidence & Have Discovery. Reference is hereby made to them and the contents of these documents are incorporated into this as though they were set out in full.

The landowners are aware that they have not prevailed in their requests to take new evidence and have discovery, and that this Court has already issued a dispositive ruling in its letter of July 3, 2001, that the Marshes shall not prevail, prior to final argument, however it remains important to point out that the reasoning underlying the decision against the Marshes should be reconsidered and reversed in this Court.

1. ***BOARD OF ZONING APPEALS OF JAMES CITY COUNTY vs. UNIVERSITY SQUARE ASSOCIATES, ("BZA v. UNIVERSITY"),*** **does not mandate that the constitutionality of legislation cannot be challenged in an appeal of a BZA action,**

where the subject of the constitutionality of the legislation has been in controversy from the beginning at the BZA. 246 VA 290, (1993).

Under the facts of the case, there is nothing in either § 15.2-2314 or *BZA v. University*, that necessarily supports the statements contained in the July 3, 2001, ruling letter that stops a Circuit Court from ruling on the constitutionality of legislation underlying a decision of a BZA. The language that appears to support those ideas has to be read along with the rest of the case, which clearly states why in that case the Circuit Court could not review the constitutionality of the legislation in controversy.

From the official headnotes:

> [1.] In a declaratory judgment action, a trial court may only resolve issues that have been specifically pleaded in the petition for declaratory judgment; here, the developer did not request that the trial court declare any portion of the special use permit unconstitutional, but rather attempted to have the court review the decision of the board of zoning appeals.
>
> [2.] In invalidating a portion of the special use permit itself, rather than the board of zoning appeals' interpretation of that legislation, the trial court erroneously ruled on an issue that was not pleaded in the litigation before it.

In so many words, the constitutional issue was not before the Court so they could not rule on the issue. All of the broad rulemaking statements

that follow, and which appear to have broader application, cannot be read as being on point, as in *BAZ v. University*, in the BZA proceedings below, the landowner did not challenge the constitutionality of Special Use Permit, (SUP). Another interpretation could be that attacking the constitutionality of legislation should be reserved for proper declaratory judgment cases, where all administrative remedies had been exhausted, which the landowner in *BZA v. University* had not yet accomplished. This second option would be very wasteful of the Court's and the litigant's time, as it would require a whole new case to be filed after the landowner's administrative rights were exhausted. The Marshes are in this Court now, and importantly, they have been contesting the constitutionality of the 1972 Rezoning Ordinance from the beginning, and specifically in the BZA below!

Please see page 37 of the transcript of the BZA proceedings where it says:

> **[N]ext we're going to show that the 1973 County reorganization[,] comprehensive reorganization and the maps that were appended to it were fatally defective, that they failed absolutely and Constitutionally because they violate the 1971 Constitution. And we contend that no governmental entity no matter what branch of the Government they're in, can violate the Constitution. We're going to put the minutes of the Board of Supervisors meeting of November 27, 1972 on which shows beyond any question that nobody knows who was present at that vote and nobody knows who voted which way or how they voted and that's an absolute violation of the**

Constitution. Whether it was a rural county or municipality, it doesn't make any difference. A nullity is a nullity.

There is no need to make numerous references to this argument as it progressed at the BZA level, but it has been constant from the beginning. There never was an effective rezoning as it pertains to this property.

Ultimately, the issue of the unconstitutionality of the comprehensive rezoning must be addressed because it bears on the issue of what can legally be done at the subject property. It makes sense from an economy of the Court's time to address this issue now, because it can and would be raised in a separate declaratory judgment action, when that action becomes available to the Marshes.

Notwithstanding the above, and regardless of the outcome of the constitutionality of the comprehensive rezoning issue, the decision that it was or was not effective still does not change the fact that the rezoning does not change the continuing existence of the Use Permit permitting the property to be operated as an airport.

2. NOTHING IN THE COMPREHENSIVE REZONING FROM 1972-3, AFFECTED THE USE PERMIT TO OPERATE AN AIRPORT.

Without belaboring the point, there is nothing in the rezoning or the maps that addresses the Use Permit issue. The argument has been that because the land may have been rezoned that this

would mean that the Use Permit was somehow retracted. There is nothing in the maps or ordinance that addresses this issue and more importantly, the operation of an airport is perfectly legal in an agriculturally zones parcel.

If the rezoning of the subject parcel were to some category where the operation of an airport were illegal then at least there would be some indication of intent on the part of the County to change the existing state of affairs with regard to the existence of the Use Permit. Nothing in the actions of the County can be said to have changed the existence of the Use Permit.

The Marshes built the airport facility based on the Use Permit and there should be nothing short of a governmental taking with compensation that could take the use away.

The Marshes claim the Use Permit to operate an airport, as the significant official act that satisfies the first leg of the test cited in the July 3d, 2001, letter Opinion of this Court. The Marshes cite the building of the airstrip as the diligent pursuit of the use authorized by the government permit or approval, incurring substantial expense in good faith *prior to the change in the Use Permit*, as satisfying the second leg of the said test. In the Opinion, the reference to "change in zoning" is relevant because the cited case, it is the change in zoning that arguably changes, or deprives the landowner of rights. In the case at bar, the rezoning from industrial to agricultural deprives the landowner of no rights because the use is legal in both zones. In order for a government to deprive this landowner of the right to operate an airport, the Use Permit would have to be taken before the airport was built.

Since the airport is there during the period that the Use Permit persists this test is met.

There is nothing in the rezoning that expressly or impliedly revokes the Use Permit to operate an airport. The only reason for the industrial zoning for the County was to allow it to have an industrial park associated with the airport.

3. THE INTERPRETATION OF FORD v. MADISON THAT IS CONSISTENT WITH THE VIRGINIA CONSTITUTION IS STATED IN THE PETITION STARTING ON PAGE 8.

It is impossible to believe that the Supreme Court of Virginia could support a case that says that a requirement of the current Virginia Constitution is not to be observed. In this strict constructionist state, judicial legislation is impermissible and a rewrite of the constitution would be *ultra vires*. If the Virginia Constitution is violated by legislation, it is illegal and void. The Marshes have made to effort to seek the voiding of the illegal 1972 comprehensive rezoning, and deserve the benefit of their work.

4. THE DENIAL OF DUE PROCESS AT THE BZA BELOW IS SEPARATE FROM THE UNCONSTITUTIONALITY OF THE REZONING AND OUGHT TO BE REDRESSED AT THIS APPEAL.

Due process is a slippery concept, often meaning different things at different times. Much of what the Marshes have to say to this issue is in the brief in support of appellants' motion to take

new evidence. Some additional material is relevant here.

[D]ue process is flexible and calls for such procedural protections as the particular situation demands. *Mathews v. Eldridge*, 424 US 319, 319, (1976). The BZA had the tools to do either a political determination, as it usually has to do in "bended knee" cases, and the tools to comport with minimal due process, and provide an adjudicative process. It had the power to get sworn statements, what we think of as testimony from the persons appearing but chose not to. They didn't get testimony, just statements, like they do in the political process. This protection was not provided although easily available.

The BZA did not provide discovery, although they could. The BZA did not provide the opportunity to cross-examine witnesses, although they could. The Marshes asked for each of these rights, many of them were asked for a number of times.

Although, standards change as the situations change, our Supreme Court has said that each citizen should have:

> **[A]n opportunity at the hearing to present testimony of witnesses...and to confront and cross-examine witnesses called by the state, except upon a finding not arbitrarily made, of good cause for not permitting such presentation, confrontation or cross-examination. (as in the instant case due to mental health problems) *Klimko v. VEC, 216 Va 750, 1978).***

The BZA did not distinguish between an adjudicative hearing and a political hearing, and the result was the denial of due process which is the landowners' right before being deprived of any significant property right. The landowner is to be given an opportunity at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of his case. (*James v. Arlington Bd of Supervisors*, 226 Va 284, 289-90, (1983). This is something that these appellants have not had and they implore this court to reconsider the July 3, 2001, letter Opinion, and find in their favor.

Walter W. Marsh
S/lra

By Counsel

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

WALTER W. MARSH, et. ux.

Appellants

Case No. CL00W-776

v.

CHESTERFIELD COUNTY
BOARD OF ZONING APPEALS, et. al.

Appellees.

NOTICE OF MOTION AND PROFFER

PLEASE TAKE NOTICE that on Friday, October 5, 2001, at 11:00 a.m., I shall 1) move this court to refrain from entering a final order in this case where there has ***never been a hearing on the merits***, 2) proffer such additional proof as may be available to plaintiff in support of its case, and 3) renew the plaintiff's motion for the taking of discovery and evidence.

WALTER W. MARSH, et. ux.

S/lra

By_____
Counsel

Lee Robert Arzt, Esquire, VSB#13192
8001 Franklin Farms Drive, #208
Richmond, VA 23229
(804) 282-9722
(804) 282-1048 fax
lit:Marsh Zone Mot to Rehear

CERTIFICATE

I hereby certify that a copy of the foregoing was mailed to Steven L. Micas, Esquire and Stylian P. Parthemos, Chesterfield County Attorney's Office, P.

O. Box 40, Chesterfield, VA, 23832, this _____ day of September, 2001.

S/lra

Lee Robert Arzt

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No.

Walter W. Marsh and
Charlotte D. Marsh,

Petitioners/Appellants

v.

Board of Zoning Appeals of Chesterfield County
and
County of Chesterfield, Virginia

Respondents/Appellees

PETITION FOR APPEAL

ASSIGNMENTS OF ERROR

The trial court erred by affirming the Board of Zoning Appeals ("BZA") refusal to overturn the County Planning Administrator's letter ruling that the subject real estate did not have a Use Permit to build an airport and independently, a Rezoning Ordinance for industrial uses, as follows:

1. The issue of whether or not the Use Permit and Rezoning Ordinance in 1969 benefited the subject parcels, and whether subsequent rezoning actions by the County were effective to cancel the effect of either the Use Permit or the Rezoning, amounted to a taking of the Appellant's vested real estate rights, which mandates an adjudicative process with at least the minimal due process guaranteed by the United States and Virginia Constitutions, and not the political process afforded at the BZA hearing.

2. The failure of the BZA to afford the Appellants the right to have witnesses sworn, and to confront witnesses by cross examination, generally indicated the lack of an adjudicative process and the political nature of the proceedings afforded by the BZA, which were a denial of due process of law as guaranteed by the U. S. and Virginia Constitutions.

3. Whether or not the rulings by the County Planning Administrator and the BZA amounted to a taking, the proceedings to adjudicate the appellant's rights at the BZA needed to be adjudicative in nature and not merely political, and the refusal of the BZA to apply minimal due process standards, as in sworn witnesses and the right of confrontation, fell below the standards

required by the U. S. and Virginia Constitutions for an adjudicative hearing.

4. The Circuit Court failed to appreciate the flexible statutory framework for the BZA which usually empowers the BZA to act as a political pressure relief valve to grant dispensation to citizens from too onerous enforcement of the land use laws, and the much less frequent need for the BZA to use its statutory, discretionary powers to conduct an adjudicative proceeding, with no less than minimal due process, as it was called to do in the case at bar.

5. The Circuit Court failed to appreciate that the standard of review of a BZA ruling would include scrutiny of its application of due process standards when the BZA is acting as an adjudicative forum as opposed to a political forum.

6. The Circuit Court failed to appreciate that the failure of the BZA to observe minimal standards of due process in an adjudicative process is a failure to apply the correct principals of law, and, therefore, within the scope of review permitted by the Supreme Court of Virginia.

7. The Circuit Court failed to appreciate that the failure of the BZA to observe minimal standards of due process in an adjudicative process is not the review of the constitutionality or validity of legislation underlying a BZA decision.

8. The Circuit Court failed to recognize the distinction between the County's alleged county-wide rezoning legislation in 1972, which would have affected the zoning of the parcels as industrial, if it were legal, but which had no effect

of any kind on the Use Permit entitling the Appellants to construct an airport.

9. The Circuit Court failed to recognize that a rezoning where the use contemplated under an issued Use Permit was permissible under both the industrial zoning before the rezoning, and the agricultural zoning after the rezoning, would not effect the continuing existence of the underlying Use Permit, and to rule otherwise is a misapplication of law and plainly wrong.

10. The Circuit Court adopted an incorrect interpretation of the legal impact of *Town of Madison V. Ford*, 255 Va. 429, (1998), as preventing citizens from attacking unconstitutional ordinances after the date of the opinion, which interpretation would make the Supreme Court opinion *ultra vires*, as though a court created by the Virginia Constitution could authorize or permit that which the Virginia Constitution does not permit, the enforcement of patently unconstitutional legislation by governmental bodies because it occurred after the date of a Supreme Court opinion.

11. The Circuit Court did not recognize the extreme error of the BZA in collecting the unsworn words of persons with no knowledge of the facts underlying any of the legislation or Use Permits, as alleged "testimony" and the entire character of the BZA proceedings as a plainly wrong application of the laws and that the BZA proceedings themselves were plainly wrong on the facts.

12. It was an abuse of discretion not to permit discovery at the BZA hearing level which resulted in the County's presentation of one of two pencil colored map sets as being better evidence of

the granting Zoning Ordinance and Use Permit than the official County written record of the Zoning Ordinance itself, particularly when there was an unproffered second set of pencil colored maps by the County stored on the same shelf, with different, conflicting information about the geographic limits of the rezoning and grant of Use Permit.

13. It was an abuse of discretion on the part of the Circuit Court trial judge not to permit the Appellants to introduce evidence at the Circuit Court appeal to show that the second set of drawings disagreed with the first, making clear that neither map set was the best evidence of anything, and certainly not better evidence of the Zoning Ordinance than the official written ordinance.

14. It was an abuse of discretion on the part of the Circuit Court trial judge not to permit the Appellants to introduce evidence at the Circuit Court appeal to show that the unsworn testimony of the County alleging the unreliability of the wording of County Zoning Ordinances from the time of the subject ordinance was factually inaccurate, based on a study proffered by the Appellants.

15. It was an abuse of discretion on the part of the trial judge to exclude evidence that clearly proved that the alleged evidence taken at the BZA level was clearly wrong.

16. When a governmental body, in this case a County, seeks to prove that an official governmental act, in this case a County ordinance, is incorrect on its face, it is error not to place the

burden of proof on the County to prove their facts by no less than clear and convincing evidence.

THE NATURE OF THE CASE

This case was commenced by the County of Chesterfield against the owners of the subject parcels of land contiguous with the Chesterfield County Airport, by means of the issuance of administrative ruling letters by the County Planning Administrator which, if unappealed within 30 days, would have made the County Planning Administrator's ruling permanent that the Marshs did not have their claimed Use Permit to operate an airport and independently, industrial zoning.

The letter rulings were properly appealed to the Board of Zoning Appeals and proceedings before the BZA were held on July 5, 2000. Appellants allege that numerous serious errors occurred at the BZA hearing level, so they filed a direct appeal to the Circuit Court of the County of Chesterfield, Virginia. Hearings there were conducted on March 8, 2001, October 5, 2001 and February 25, 2002. The Court wrote its opinion prior to final argument on July 3, 2001, but then decided to hear final argument, wherein the Appellants noted their exceptions to the ruling both verbally and in writing. The Court did not change its opinion after final argument and found that the BZA did not incorrectly apply the law and that the facts supported the BZA's conclusions in the Circuit Court's Final Order of February 25, 2002.

The Appellants noted their appeal, filed the transcripts of the proceedings and now pray that

the Supreme Court will accept this appeal and grant the relief Appellants seek.

QUESTIONS PRESENTED

1. Whether or not the 1969 County Rezoning Ordinance granting the industrial zoning and Use Permit to operate an airport on the subject land is proven by presenting the Ordinance which lists the stipulated predecessor parcel as being part of the legislation without making any distinction that either the whole or just part of the parcel is the subject of the ordinance.

2. Whether or not the unofficial records of the County Planning Office, (not the County official records), embodied on two sets of conflicting pencil colored maps where only one was admitted in evidence at the BZA appeal could be used to impeach or modify the official written words of the ordinance granting the rezoning and Use Permit.

3. Whether or not unsworn words taken at a BZA adjudicative hearing (appeal) are in fact testimony and whether that kind of evidence is capable of impeaching the official records of the legislative actions of a County.

4. Whether or not unsworn words taken at a BZA appeal from parties called by the County, who had no personal knowledge of the facts to which they spoke could be taken to impeach the official records of a County.

5. Whether or not it comports with due process requirements in the U. S. and Virginia Constitutions, to permit a taking of vested legal

rights in real estate from citizens, where 1) witnesses against them are unsworn or where 2) the citizens do not have the right of confrontation by cross-examination.

6. Whether or not it comports with due process requirements in the U. S. and Virginia Constitutions, to permit the adjudication of vested legal rights of a citizen where 1) witnesses against them are unsworn or where 2) the citizens do not have the right of confrontation by cross-examination.

7. Whether or not it comports with due process requirements in the U. S. and Virginia Constitutions, to permit the adjudication of vested legal rights of a citizen by a political, non-adjudicatory process.

8. Whether or not the BZA abused its discretion by not using its powers to permit discovery, the swearing or confrontation of witnesses.

9. Whether or not the Circuit Court abused its discretion by not over-ruling the BZA for its failure to use its powers to permit discovery, swearing or confrontation of witnesses.

10. Whether or not the 1972 county-wide rezoning which purported to rezone the subject land from industrial to agricultural, would have the effect of terminating a Use Permit which is independent of zoning; particularly where the use permitted by the Use Permit was legal in both industrial and agricultural zones, both before and after the 1972 rezoning.

11. Whether or not the 1972 county-wide rezoning was unconstitutional for failure to record the vote of the individual County Supervisors.

12. Whether it is constitutionally permissible to interpret opinions of the Virginia Supreme Court in a way that would make the opinion *ultra vires*, as though a court created by the Virginia Constitution could authorize or permit that which the Virginia Constitution does not permit, the enforcement of patently unconstitutional legislation by governmental bodies because it occurred after the date of a Supreme Court opinion.

13. Whether or not the denial of due process in the BZA appeal is the proper subject of the review at the Circuit Court level.

14. Whether or not it was an abuse of discretion for the trial judge to refuse to admit evidence at the Circuit Court appeal from the Appellants to show that the set of maps produced by the County was not reliable evidence by showing the other set of maps (all of which were unofficial at the time of the granting ordinance), which directly contradicted the set the County introduced.

15. Whether or not it was an abuse of discretion for the trial judge to refuse to admit evidence proffered by the Appellants to refute the County's alleged evidence alleging that the words in the written County ordinances at the time were not reliable.

16. Whether or not the facts adduced at the BZA hearing were plainly wrong.

17. Whether or not the law applied in the BZA hearing was incorrect.

STATEMENT OF FACTS

Walter W. Marsh, the husband Appellant, ("Mr. Marsh"), is, among other things, a professional engineer, a land developer and a pilot, who purchased parcels of land contiguous with the Chesterfield County Airport in the hope that someday he would have access to the airport from his property to further one of his main interests, flying. This did not seem likely to happen in the near future, and this was a frustration but he accepted this until he did some research on the parcels he and his wife own and found out that it was rezoned industrial and granted a Use Permit to operate an airport at the same time all of the contiguous land was rezoned and granted an airport Use Permit when the Chesterfield County Airport was formed.

There is no dispute that the 1969 County of Chesterfield Ordinance 69-64, granting the Use Permit to operate an airport, and which grants industrial zoning lists the stipulated predecessor parcel(s) from which the lands in issue are taken. Not a soul who testified at the BZA hearing had actual knowledge of the facts and circumstances of the County's zoning and use permit history, other than what is in the official County records.

Upon researching and learning of the rights that official County records indicate for his land, and being genuinely pleased, Mr. Marsh undertook to clear and grub, grade and seed, a new grass airstrip for the personal use and pleasure of friends and himself, with a possible eye towards what

might be done commercially in the future with an airstrip so located. The airstrip was constructed and put into use, with safety and care, which is not the subject of this appeal, but almost from the start the County ordered Mr. Marsh to cease using the airstrip. He responded that he had the legal right to conduct airport operations at the site and cited the Chesterfield Ordinance granting his real estate the Use Permit and the industrial zoning.

The County Planning Administrator issued a number of letter opinions that ruled that Mr. & Mrs. Marsh's parcels did not have the right to the Use Permit or the industrial zoning which placed the Marshes in the position of losing their rights forever or appealing them to the BZA as provided by law.

The Marshs anticipating an adjudicative hearing wrote to the Chairman of the BZA asking for BZA for the right to subpoena rights and notified the BZA that it wished to have all witnesses sworn as a part of these proceedings. The sum and substance of the BZA responses were that the Marshs would not have such rights and that the BZA would conduct its hearing as it saw fit in the usual way. The transcript of the hearing speaks for itself. It was not an adjudicative hearing but a political hearing without the necessity of due process of law. There was no discovery of any kind. The cases of each party would only be known when presented. Surprise was the overriding element and evidence within the County's possession and unknown to the Appellants was produced as though valid to impeach or explain an ordinance when equally good evidence from the same shelf of the County records conflicted with the evidence admitted

proving that the evidence introduced by the County was not trustworthy.

Not even the swearing of witnesses was seen as necessary to dispose of the politically incorrect Marshs' case. The atmosphere was of politics and getting the case done and to bed and not that of an adjudicative hearing. No cross-examination was permitted. Unsworn witnesses, although well meaning, allegedly testified in a situation where no real challenge to the County was possible.

At the end there was no use to continue on at the BZA for there could be no adjudicative form of justice there.

The appeal to the Circuit Court pursuant to §15.2-2314, of the Code of Virginia, as amended, was limited as though what the Court was to review was the political decision of that body. Under this very limited view of the power of the Court to review the actions of the BZA, it did not matter whether there was a constitutionally mandated adjudicative hearing for a taking of rights or an adjudication of rights or not. It did not matter whether there was real evidence taken for an adjudication or whether the words were unsworn and the confrontation of witnesses denied. Evidence that what was presented to the BZA was patently untrue was proffered at the Circuit Court Appeal, and this evidence was refused by the trial judge, (referring to the proffered second set of County maps in disagreement with the first and the statistical analysis of the trustworthiness of the County ordinances from the period relating to whether they clearly referenced partial parcels when it is the County's intent to only effect a part of a parcel).

While the members of the BZA, opposing counsel and the Court are all well meaning, nowhere in the course of this litigation has there been minimal due process, or more bluntly, the rule of law or justice.

The facts regarding the vesting of Marsh's right to operate an airport and to use the industrial zoning are as follows:

a. On September 24, 1969, Chesterfield County Ordinance No. 69-64 was legally passed naming Parcel 65-19, a stipulated predecessor parcel to the Marsh lands which are the subject of this case, to be benefited with a Use Permit to operate an airport and was granted industrial zoning.

b. In 1972, Chesterfield County purported to adopt a county-wide rezoning plan which purported to rezone the subject land from industrial to agricultural zoning.

c. In the enactment of the 1972 county-wide rezoning, at the Board of Supervisor's meeting the minutes of the meeting and the ordinance itself do not record the vote of each Supervisor as is required by the Virginia Constitution, not are the words of the ordinance passed recorded.

d. Approximately in the Spring, 1999, Marsh begins to discover that the land that he owns was granted a Use Permit to operate an airport and industrial zoning. Later research bears this finding out.

e. Approximately Spring 2000, Marsh constructs his airstrip.

f. On or about May 25, and June 15, 2000, Chesterfield County issues the letter rulings denying that Marsh has the Use Permit and industrial zoning, forcing Marsh into these proceedings.

LAW AND ARGUMENT

A. THE APPEAL AT THE BZA WAS POLITICAL IN NATURE, NOT ADJUDACATIVE AS WAS REQUIRED.

The following is a brief reprise of salient moments at the BZA hearing or appeal all of which can be obtained from the transcript of the hearing, (save for the facts in Paragraph 1), which is a part of the record:

1. Prior to the commencement of the BZA "case," there was a presentation which was unfortunately not recorded by the court reporter. It was supposed to give an introduction to the facts and issues in the case in a neutral manner, but which was not neutral and parallels the procedure used in political cases before the BZA and administrative bodies where the case is predigested for the panel in a way that is not capable of being influenced by the private party litigant.

2. The BZA "appeal" was supposed to be the citizen's case, but the fact that this was his matter to bring before the BZA did not [illegible] that he had the right to present his appeal first. (Transcript, p. 8)

3. There was a poisoning of the well tactic by the County where it is brought up that they *suspected* that the Appellant cut down some County trees. This irrelevant issue is raised more than once during the hearing in an attempt to impugn the integrity of the Appellant without evidence, something that might be politically acceptable but not evidence of an adjudicative hearing. Please see BZA Transcript, p. 9, and Appellant's objection, p. 9, line 23, and others).

4. Please see BZA transcript, p. 12, where the introduction begins for the unsworn "testimony" and argument that the official County records do not mean what they say. County is to use the Administrator of Planning. There is a reference to a prior statement by Marsh that his land was agricultural, (made before he did the research on the zoning history of the land). When Appellants attempt to cross-examine, (BZA Transcript, p. 20, line 25) answer, (by County) we'll get around to it, (BZA Transcript, p. 21, line 2).

5. At the end of the next witness's "testimony," the Appellants ask for the right to cross-examine. (BZA Transcript, p. 27, line 17). The Appellant is not allowed. Appellant asks if he can he be questioned in the Appellant's case? Opposing counsel answers that the witness will only stay to answer the Board's questions. This is apparently the BZA ruling because no one on the BZA responds to challenge the "ruling" by opposing counsel, who is usually the counsel for the County and the BZA.

6. When the County Planning Administrator "testifies" about the two sets of maps, (BZA Transcript, p. 30), he is referring to the set of

pencil colored maps that they introduced, but not the second set of pencil colored maps. The other maps referred to are the 1972-73 rezoning maps.

7. The crux of the County Planning Administrator's "testimony" is that someone in the Planning Office kept an unofficial set of pencil colored maps, which were colored in after rezonings and which are the best evidence of the boundaries of each rezoning. Most interestingly, the Planning Administrator did not know there was a second set of pencil colored maps on the same County storage shelf with conflicting information about this parcel. If there were discovery, there would have been the discovery of the second set of pencil colored maps and the end of this valueless line of "testimony." If there had been cross-examination, this line of "testimony" could have been countered.

8. Similarly, if there had been discovery granted, or maybe even just an oath administered, or cross-examination permitted, the County Planning Administrator could not have testified that the County was not be consistent in stating in ordinances when a part versus the whole was to be effected. He "testified..."

> **...the Board was not, the County was not consistent at that time. On this particular rezoning, there's several pieces of property that are part of the parcel. One is the subject in question. One is Tax Map No. 65, parcel 19, which includes Mr. Marsh's property at this time. However, you can see the recording of the rezoning clearly shows a line that is not coincidental with the property line of this parcel 19. [He is referring to the pencil colored maps, not a part of the ordinance or permit**

record, as being the *ne plus ultra* test of what land was actually rezoned and granted a Use Permit]. Parcel 19 includes the area that was colored as rezone and then the white was not colored and therefore not part of that zone....

"Therefore my decision was that in 1969 the parcel of Mr. Marsh and the subject of this hearing was not rezoned to manufacturing [what industrial zoning used to be called] what the conditional use was and that was the basis for my decision. (BZA Transcript, p. 32., line 9, *et seq.*)

The importance of the County Planning Administrator's "testimony" cannot be overemphasized. The BZA members picked it up unambiguously...

(BZA Transcript, p. 33, line 8)

Mr. Caperton: [a Board Member] "It's probably not likely that they would include another airport at the base of the parcel....

Mr. Moore: [speaking to the Planning Administrator] Tom you mentioned that there was no specific map for the rezoning? [meaning an official map in the rezoning file]

Planning Administrator: No Sir.

Mr. Moore: And you made a statement on there that this was usually a case that you depended upon that people can make a mistake but what are the chances at making a mistake on something like this? [referring to the pencil colored maps]

Planning Administrator: My personal opinion is that the chances are very remote... [that there would be a mistake in the pencil colored maps]

We know from the second set of pencil colored maps that the actual chance of an error, unknown to the Planning Administrator, was 100%! (Yet this was not admissible evidence in the Circuit Court appeal!)

Here is a Board Member speaking from the transcript towards the end of the hearing picking up on the just-referenced testimony of the County Planning Administrator:

> **"We've heard from Mr. Jacobsen, [County Planning Administrator] that his research shows that back *in the old days* [emphasis added], when they were just proposing to affect a portion of the tax map they didn't really indicate it and in some cases they just referenced the entire map to identify the parcels that were affected. . . I don't think we can draw any conclusions and we can assume that the entire parcel was, each of those tax map parcels was rezoned or was affected by the action taken by the Board of Supervisors. . . [He goes on to discuss the number of acres rezoned saying]. . . I think that the zoning map that's in the custody of the agency for the County that are charged with the duty in determining and enforcing the Zoning Ordinance is the best evidence we have here to tell us exactly what was rezoned. (BZA Transcript, p. 86, line 15, *et. seq.*).**

Please see BZA Transcript, p. 42, line 20, *et seq.*, for a reference to the fact that witnesses are not sworn.

Consistent with the non-adjudicative, political nature of the hearing towards the end of the hearing, the BZA member asks for public opposition to the Appellant's position. (BZA Transcript, p. 74, line 17, *et. seq.*). The Appellants say that they have support from the public who are there to speak, but they are *not allowed to speak!* Another instance of lack of due process.

It is clear from the transcript that the pencil colored maps, unofficial maps that the Board of Supervisors did not see and did not control, but that employees of the County kept, were seen by the BZA in error, as the best evidence of the land rezoned and Use Permit granted in this case, clearly in error, due to the lack of due process in the BZA case. The story about the *old days* and the inefficiencies of the people in the government back in the late 1960's and 1970's, which was not so very long ago, should not justify taking the written language of a County Ordinance out of effect. There was not one word of justification to support the judgment that back in the *old days* the people were any less competent than they are now, and no evidence on the record that shows how this was true regarding Chesterfield ordinances, no swearing of witnesses, no discovery, and no cross-examination which could show the shallowness with which the BZA proceeded.

As we will see in the analysis of the proceedings at the Circuit Court, all of the errors at the BZA level ere acceptable and there would be

no opportunity to ever correct the failures of justice at the BZA level.

B. AT THE BZA HEARING THERE WAS NO GENUINE TESTIMONY BY COUNTY WITNESSES, BECAUSE TESTIMONY MUST BE SWORN; THERE WAS NO LEGITIMATE MEANS TO INTRODUCE OTHER EVIDENCE, WHICH ELIMINATED ALL THE COUNTY'S EVIDENCE FROM LEGITIMATE CONSIDERATION.

It is the Appellants' position that all of the words spoken by the witnesses for the County at the BZA hearing did not rise to the level of testimony as it is generally accepted in an adjudicative hearing. The Marshs make the distinction between general conversation or political speech on the one hand and speech that rises to the level of testimony on the other.

In general conversation or political speech, one may have many opinions and take positions which are intended to persuade, but those not under oath statements do not rise to the level of reliability that we think sworn statements have, (regardless of whether or not the oath is consistently successful in inducing the speaker to tell the truth). What is said in those circumstances where an oath or affirmation is involved is expected to be of a higher quality of truthfulness than the quality of speech intended to be elicited at, let's say, a zoning hearing.

The ultimate impact of what is said at, for instance, a zoning hearing is an expression of the political will of the speaker. The speaker is usually for or against the subject of discussion and even experts who speak are directly in the employ

of either a proponent of the pro or con side of the debate with no particular reason to "tell the truth" as we believe a speaker is when he is under oath in an adjudicative forum, an investigative process like a grand jury or making a statement under oath for some governmental process.

The Marshs argue that there was no testimony by any witness on behalf of the County because none of the words spoken were under oath. The Court of Appeals has addressed this subject albeit for a different purpose (perjury) in *Scott v. Commonwealth*, 14 Va. App. 294, 416 S.E. 2d 47, (1992). In that case the Court raised a number of different scenarios where a person might give "testimony" for the purposes of deciding when a person might be susceptible of being charged with perjury.

While the purpose in that case is different than in the case at bar, the key element, the administration of the "oath" or some legal equivalent, was the determining factor. And the Court said:

> **...The use of the words, "testimony" and "testify" in the various sections of the Code enumerated above, lead us to conclude that the term, "give testimony"... encompasses any material declaration made under oath, whether *ex parte* or in an adversary proceeding subject to cross-examination.... p. 298.**

The Appellants asked that the witnesses be sworn as the BZA hearing began, but this does not appear on the record because it may have occurred

before the case was called. This issue was raised again at the conclusion of the County's case on the record. (BZA Transcript P. 42, line 20). At all times the Appellants' reasonable request was rebuffed. Appellants unsuccessfully raised the issue of the lack of due process at the Circuit Court appeal based on the failure to obtain oaths and the failure to permit the confrontation or witnesses. Please see the March 8, 2001, Circuit Court Transcript, P. 5, *et. seq.*

Since there was no genuine testimony by County witnesses by the County's and the BZA's chosing, nothing they did there supports a finding that the County should prevail and the fact they were so opposed to normal due process is indicative of the fact that this matter should not be returned to the BZA or Circuit Court, if at all possible.

Based on the above, there is no factual or legal basis for the BZA or the Circuit Court findings in favor of the County, and the Appellants should prevail as they were ready to be sworn and give evidence and ready to confront witnesses as necessary to pursue their rights.

C. THE MOST MINIMAL STANDARDS OF DUE PROCESS WERE NOT OBSERVED BY THE BOARD IN THE HEARING BELOW, DEPRIVING THE PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS AND CONTRIBUTED GREATLY TO THE MISAPPLICATION OF LAW AND PLAINLY WRONG CONCLUSIONS OF FACT.

While the BZA may not be an agency like many others, and while it is acknowledged that it has a number of different functions, such as acting as a

citizen check against the unfair imposition of harsh zoning laws, etc.; it also has the function of an adjudicative body, as it had in the case at bar. When it acts as an adjudicator, it must act in a way that gives the parties both a full and fair hearing, observing the norms of due process. The extremely informal and unwritten rules that it uses in cases for the relief of citizens who claim to be over burdened with regulations do not suffice where the Board is acting as an adjudicator.

The petitioners in the case at bar were about to lose their rights to claim industrial zoning and a Use Permit to operate an airport on their land. These are substantial property rights, worth a considerable amount. Mr. Marsh had built an airstrip based on his perceived rights in reliance. American law just does not permit substantial rights to be taken away without due process.

> Procedural due process has been said to require that before an individual is deprived of any significant property interest he must be granted an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. *Williams v. Virginia Electric & Power Co.*, 18 Va. App. 569, 576-77, 445 S. E. 2d 693, 698 (quoting *James v. Arlington Bd. of Supervisors*, 226 Va. 284, 289-90; 307 S. E. 2d 900, 903, (1983). While the requirements in administrative proceedings may be more relaxed, "the Commission must use procedures that 'afford the parties minimal due process safeguards.'" *WLR Foods, Inc. v. Cardosa*, 26 Va. App. 220, 227, 494 S.E. 2d 147, 150 (1997), quoting *Sergio's*

Pizza v. Soncini, 1 Va. App. 370, 376; 339 S.E. 2d 204,207 (1986); all quoting *Georgia Pacific Corp. v. Davis*, 1998 Va. App. Lexis 422.

The United States Supreme Court specified the minimum requirements of constitutional due process, which must attend administrative hearings, the right to confront adverse witnesses, and present one's own evidence, and an impartial decision maker. *Goldberg v. Kelly*, 397 U. S. 254 (1970); and this case is followed in Virginia, in *Hladys v. Commonwealth*, 235 Va. 145, 366 S.E. 2d, 98 (1988).

Section 15.2-2312 of the Code of Virginia grants the Board the discretion to swear in and subpoena witness, but that discretion cannot be used in a way that it fundamentally denies the parties the opportunity to have a full and fair or at lease a minimally fair hearing. While it might be argued in some of the Board's cases that swearing and subpoenaing witnesses are not necessary, where as in the case at bar, there are substantive issues for adjudication, with the County on one side and a private citizen on the other, and the citizen asks that witnesses be subpoenaed and sworn, (please see pp. 42, line 15, and lines 20-21 of the Transcript), petitioners argue that the failure to grant these requests are an abuse of discretion and the denial of constitutional rights.

Whether or not the Board is such an administrative body as to be directly subject to the Virginia Administrative Process Act, §9-6.14:1 *et. seq.*, the Act establishes the norms for proper administrative procedure in Virginia. Since this was an adjudicative hearing of disputed rights, we shall focus on the section of the Act that deal with cases like the case at bar. Section 9-6.14:11 deals

with informal fact finding. In the case at bar, this procedure might be analogous to the Director of Planning's letter decision process that the petitioners did not have the zoning or use permit that they alleged. Even at this stage the parties have rights,

> **C. . . . Such conference-consultation procedures include rights of parties . . . (iii) to have reasonable notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision,**
>
> **D. Agencies may, in their decisions, rely upon public data, documents or information *only* [emphasis added] when agencies have provided all parties with advance notice of an intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent.**

Never were the petitioners granted any of these rights. The materials that were used to detract from the Board of Supervisor's official written records were never noticed to the petitioners. No study of the written records of the County was ever produced or noticed. All this was to be a surprise at the hearing, and then no right even to cross-examine the witness testifying to this previously unknown data was allowed.

While Appellants do not feel that the Board was conducting a hearing analogous to an informal

hearing, a review of what rights the Virginia legislature gave to parties in a lesser situation will emphasize how poorly the petitioners were treated in the hearing at the Board. The petitioners had no notice of the factual basis for the possible adverse decision of the Board. The petitioners had no way to know what public data, documents or information was to be considered. In fact, the petitioners believe that there is a procedure whereby the County gets to apprise the Board in advance of its case and plans, where the citizen gets no invitation at all.

When informal conferences don't work and the matter is to be litigated, a statutory procedure more in line with the appeal to the Board, §9-6.14:12. Litigated Issues, applies.

> **. . . B. Parties to such formal proceedings shall be given reasonable notice of . . . (ii) the basic law or laws under which the agency contemplates its possible exercise of authority, and (iii) the matters of fact and law asserted or questioned by the agency. . . .**
>
> **C. In all such formal proceedings the parties shall be entitled to . . . submit oral and documentary evidence and rebuttal proofs, to conduct such cross examination as may elicit a full and fair disclosure of the facts, . . . The presiding officers at such proceedings are empowered to (i) administer oaths and affirmation, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged,**

or repetitive proofs, rebuttal or cross-examination, rule upon offers of proof and oversee an accurate verbatim recording of the evidence, . . .

D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefore. . .

.

In the case at bar, at the hearing before the Board, the petitioners were never told about the matters of fact which were going to be asserted. Instead they were greeted with insinuations about prior conduct of which they had no notice, (BZA Transcript, p. 9, the tree cutting issue). Our objection to the irrelevant issue attempting to poison the well against the petitioners did not stop the County from bringing this up again. (Please see BZA Transcript, pp. 22-27). Petitioners were denied the right to have witnesses subpoenaed (BZA Transcript, p. 42, line 15); they were denied the right to cross examine or even question the County's witnesses, (BZA Transcript, pp. 20 and 21, p. 27, line 17); no oaths were administered even though the petitioners requested this. (BZA Transcript, p. 42, lines 20-21). There are also letters in the file asking for this before the hearing. The Board refused to exclude poisonous references to irrelevant matters such as the cutting of trees by some unknown person(s), all of the County's evidence was insubstantial but so much as the test of an oath was not afforded petitioners. In the end, no rebuttal was permitted petitioners. This was not close to a full and fair

hearing, and there is no way that the petitioners should be forced to go back to the Board to have this treatment again.

The hearing before the Board was fatally defective and the Circuit Court did nothing to correct these injustices. The trial judge should have permitted the petitioners to submit all of the facts anew, with full discovery and apply the appropriate law.

D. NOTHING IN THE COMPREHENSIVE REZONING FROM 1972-3, AFFECTED THE USE PERMIT TO OPERATE AN AIRPORT.

There is nothing in the 1972-73 comprehensive rezoning or the official zoning maps or even the pencil colored maps that addresses the Use Permit issue. The argument has been that because the land may have been rezoned that this would mean that the Use Permit was somehow retracted. There is nothing in the maps or Ordinance that addresses this issue, and more importantly, the operation of an airport is perfectly legal in an agriculturally zoned parcel. The pencil colored maps and the later official County Zoning maps to not even address the issue of whether or not a Use Permit is issued for a parcel of land.

If the rezoning of the subject parcel were to some category where the operation of an airport were illegal, then at least there would be some indication of intent on the part of the County to change the existing state of affairs with regard to the existence of the Use Permit. Nothing in the actions of the County can be said to have changed the existence of the Use Permit.

The Marshs built the airport facility based on the Use Permit and there should be nothing short of a governmental taking with compensation that could take the use away.

The Marshs claim the Use Permit to operate an airport as the significant official act that satisfies the first leg of the test cited in the July 3, 2001, Opinion Letter of the Circuit Court. The Marshs cite the building of the airstrip as the diligent pursuit of the use authorized by the government permit or approval, incurring substantial expense in good faith *prior to the change in the Use Permit*, as satisfying the second leg of the said test. In the Circuit Court Opinion Letter, the reference to "change in zoning" is relevant because in the cited case, it is the change in zoning that arguably changes, or deprives the landowner of rights. In the case at bar, the rezoning from industrial to agricultural deprives the landowner of no rights to the Use Permit to operate an airport, because the use of the land as an airport is legal in both zones. In order for a government to deprive this landowner of the right to operate an airport, the Use Permit would have to be taken before the airport was built. Since the airport is there during the period that the Use Permit persists this test is met.

There is nothing in the rezoning that expressly or impliedly revokes the Use Permit to operate an airport. The only reason for the industrial zoning for the County was to allow it to have an industrial park associated with the airport. While the Marshs argue that they should be able to keep the industrial zoning through the county-wide 1972-73 rezoning, even if they are not able to, the Use Permit is unaffected by the rezoning and persists, if at all, to this day.

E. *BOARD OF ZONING APPEALS OF JAMES CITY COUNTY vs. UNIVERSITY SQUARE ASSOCIATES, ("BZA v. UNIVERSITY"),* DOES NOT MANDATE THAT THE CONSTITUTIONALITY OF LEGISLATION CANNOT BE CHALLENGED IN AN APPEAL OF A BZA ACTION, WHERE THE SUBJECT OF THE CONSTITUTIONALITY OF THE LEGISLATION OF THE LEGISLATION HAS BEEN IN CONTROVERY FROM THE BEGINNING AT THE BZA. 246 VA 290, (1993).

Under the facts of the case, there is nothing in either §15.2-2314 or *BZA v. University* that necessarily supports the statements contained in the July 3, 2001, ruling Circuit Court Opinion Letter that stops a Circuit Court from ruling on the constitutionality of legislation underlying a decision of a BZA. The language that appears to support those ideas has to be read along with the rest of the case, which clearly states why in that case the Circuit Court could not review the constitutionality of the legislation in controversy.

From the official headnotes:

> **[1.] In a declaratory judgment action, a trial court may only resolve issues that have been specifically pleaded in the petition for declaratory judgment; here, the developer did not request that the trial court declare any portion of the special use permit unconstitutional, but rather attempted to have the court review the decision of the board of zoning appeals.**

> [2.] In invalidating a portion of the special use permit itself, rather than the board of zoning appeals' interpretation of that legislation, the trial court erroneously ruled on an issue that was not pleaded in the litigation before it.

In so many words, the constitutional issue was not before the Court so they could not rule on the issue. All of the broad rulemaking statements that follow, and which appear to have broader application, cannot be read as being on point, as in *BAZ v. University*. in the BZA proceedings below, the landowner did not challenge the constitutionality of Special Use Permit, (SUP). Another interpretation could be that attacking the constitutionality of legislation should be reserved for proper declaratory judgment cases, where all administrative remedies had been exhausted, which the landowner in *BZA v. University* had not yet accomplished. This second option would be very wasteful of the Court's and the litigant's time, as it would require a whole new case to be filed after the landowner's administrative rights were exhausted. The Marshs are in this Court now, and importantly, they have been contesting the constitutionality of the 1972 Rezoning Ordinance from the beginning, and specifically in the BZA below!

Please see page 37 of the transcript of the BZA proceedings where it says:

> [N]ext we're going to show that the 1973 County reorganization[,] comprehensive reorganization and the maps that were appended to it were

fatally defective, that they failed absolutely and Constitutionally because they violate the 1971 Constitution. And we contend that no governmental entity no matter what branch of the Government they're in, can violate the Constitution. We're going to put the minutes of the Board of Supervisors meeting of November 27, 1972, on which shows beyond any question that nobody knows who was present at that vote and nobody knows who voted which way or how they voted and that's an absolute violation of the Constitution. Whether it was a rural county or municipality, it doesn't make any difference. A nullity is a nullity.

There is no need to make numerous references to this argument as it progressed at the BZA level, but it has been constant from the beginning, the constitutionality of the county-wide rezoning was challenged from the first moves and continuously challenged through the case's development.

If for any reason it appears to the Court that the constitutionality of the 1972-1973 rezoning cannot be considered in connection with these proceedings, we would be pleased to put the part of this case pertaining to that issue on hold while we litigate the constitutionality of the rezoning in any forum and by any form of litigation the Court believes is appropriate.

Ultimately, the issue of the unconstitutionality of the comprehensive rezoning must be addressed because it bears on the issue of

what can legally be done at the subject property. It makes sense from an economy of the Court's time to address this issue now, because it can and would be raised in a separate declaratory judgment action, when that action becomes available to the Marshs.

F. THE ALLEGED ENACTMENT OF THE 1972-73 COUNTY-WIDE REZONING ORDINANCE HAD NO EFFECT ON THE PREVIOUS REZONING TO INDUSTRIAL (MANUFACTURING) OR ON THE USE PERMIT BECAUSE THE ENACTMENT WAS UNCONSTITUTIONAL.

The subject property remained under the 1969 industrial zoning and Use Permit and unaffected by the county-wide rezoning because the 1972-73 ordinance was never properly or legally enacted. The Constitution of Virginia in effect at the time of the alleged enactment in 1972-73 is the 1971 Constitution of Virginia, adopted effective July 1, 1971. Article 7, §7, provided then as it does now, the following requirement for Boards of Supervisors:

> "Procedures, . . .
>
> On final vote on any ordinance or resolution, the name of each member voting and how he voted shall be recorded.

The petitioners quote from the official minutes of the November 27, 1972, meeting of the County Board of Supervisors, finally approving the 1973 zoning ordinance, as recorded in Minute

Book, Number 19, kept in the Clerk's Office in the Circuit Court of the County of Chesterfield:

> **". . . It was decided that Stanley Crump's Store be zoned B-2 and the Clements Store on Route 360 be zoned B-3.**
>
> **Upon consideration whereof and on motion of My Myers, seconded by Mr. Krepela, it is resolved that the proposed Ordinance and the accompanying maps denoting the different zoning districts in the County be and the same are hereby approved to be become effective January 1, 1973,**
>
> **On motion of Mr. Apperson, seconded by Mr. O'Neill, it is resolved that this Board go into Executive Session.**
>
> **Ayes: Mr. Horner, Mr. Myers, Mr. Apperson and Mr. O'Neill.**

Nowhere in the official minutes does it say which members of the Board were present at the time of the voting of the zoning ordinance, not does it say who voted which way, up or down. There isn't even a mention that the vote was unanimous, which would not cure the vote according to the Virginia Constitution anyway.

A nullity cannot void prior legal acts, which is what the County is arguing in the case at bar. The grant of the Use Permit and the industrial zoning cannot be affected by the failed enactment

of subsequent legislation. *Town of Madison v. Ford* cannot change the impact of this either.

As we will argue, below it is not constitutionally possible for any Court created by a constitution to rule that the Constitution is not binding on all the citizens in a state and the Courts and all governmental entities are similarly included. The County argues and the Circuit Court in error accepted that after the date of the opinion in *Madison v. Ford*, that the unconstitutionality of the enactment of an ordinance cannot be challenged in Court. As we close it is relevant to note that the wording of the ordinance in question is not included in the minutes of the meeting which means that the County has no official way of knowing what the wording of the allegedly passed ordinance contains.

G. *TOWN OF MADISON V. FORD*, 255 Va. 429, (1998), DOES NOT RESTRICT CITIZENS FROM CHALLENGING UNCONSTITUTIONALLY ENACTED ORDINANCES IN COURT.

People often say that in Virginia we take contracts really seriously, and we do. There is one form of contract, however, that is elevated above all others and that is the contract that all the citizens make together to form a government. A constitution is that most serious of contracts and in our form of government we take constitutions most seriously.

Madison v. Ford is about a citizen, not unlike the Marshs, who went all the way to the Virginia Supreme Court to prove a point. In that case the

citizen was right, and in the case at bar the citizen is right.

Madison v. Ford **cannot be read to mean that after the Ford citizen achieves its goal by challenging the enactment of an ordinance that no one can again use that path. What was illegal is still illegal. And what is illegal will not be upheld in this Commonwealth. The only correct interpretation of that case is that the Supreme Court wisely said that if the Board of Madison messed up on this ordinance, it may well have messed up on many of them, and we are not going to wipe away all the ordinances from the past in a wholesale manner,** ***unless there is a citizen who is willing and able to bring their case all the way to a Court that will recognize the citizen's rights.*** **This is precisely what Marsh has done in the case at bar.**

Virginia Courts are not supposed to rewrite constitutions and it is nigh onto blasphemy to suggest that they would endeavor to do so in ***Madison v. Ford.*** **The Virginia Constitution of 1971 remains intact to this day and all citizens must have resort and refuge to it when they may.**

The 1972-73 Chesterfield county-wide zoning ordinance must fall by the pen of the Virginia Supreme Court, because it is duty bound to enforce the Virginia Constitution of 1971, and this is what is prayed for in this petition.

RELIEF PRAYED FOR

Wherefore do your Appellants respectfully submit this petition, and pray that the Appellants be given a Writ of Certiorari granting them the

opportunity to present their case in full before this Court.

The ultimate relief sought is:

The reversal of the rulings of the Circuit Court and BZA denying the Appellants the Use Permit to operate an airport and industrial zoning.

If for any reason it is determined that further proceeds are needed in a different form of action from those utilized herein, then the Appellants pray that the Supreme Court grant such additional time as may be necessary to accomplish this litigation so that the entire matter is properly before the Supreme Court for decision.

WALTER W. MARSH
CHARLOTTE D. MARSH

_____

By Counsel

Lee Robert Arzt, Esquire, VSB#13192
8001 Franklin Farms Drive, Suite 208
Richmond, VA 23229
(804) 282-9722
(804) 282-1048 facsimile

CERTFICATE

Lee Robert Arzt, Counsel of Record for Walter W. Marsh & Charlotte D. Marsh, hereby certifies that:

1. The Appellants are Walter W. Marsh and Charlotte D. Marsh, of 8232 Chainmale Road, Richmond, VA 23235.

2. Counsel for the Appellants is Lee Robert Arzt, 8001 Franklin Farms Drive, Suite 208, Richmond, VA 23229.

3. The Appellees are the BOARD OF ZONING APPEALS OF CHESTERFIELD COUNTY and the COUNTY OF CHESTERFIELD, VIRGINIA, and their addresses are 4856 Burnham Road, Richmond, VA 23234, and P.O. Box 40, 9901 Lori Road, Chesterfield, VA 23832-0040, respectively.

4. Counsel for both Appellees are Steven L. Micas, County Attorney, Stylian P. Parthemos, Senior Assistant County Attorney, and David W. Robinson, Assistant County Attorney, P.O. Box 40, Chesterfield, Virginia 23832.

5. All parties are represented by counsel. Copies of the foregoing Petition for appeal have been mailed or delivered on the date stated therein to Steve Micas, County Attorney, Stylian P. Parthemos, Senior Assistant Attorney and David W. Robinson, Assistant County Attorney, at the address stated above, they being the only opposing counsel in this matter.

6. Counsel for the Appellant desires to appear and present oral argument before the Court.

_____

Lee Robert Arzt

When Appellants attempt to cross-examine, (BZA Transcript, p. 20, line 25) answer, (by County) we'll get around to it, (BZA Transcript, p. 21, line 2).

5. At the end of the next witness's "testimony," the Appellants ask for the right to cross-examine. (BZA Transcript, p. 27, line 17). The Appellant is not allowed. Appellant asks if he can he be questioned in the Appellant's case? Opposing counsel answers that the witness will only stay to answer the Board's questions. This is apparently the BZA ruling because no one on the BZA responds to challenge the "ruling" by opposing counsel, who is usually the counsel for the County and the BZA.

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apparently the BZA ruling because no one on the BZA responds to challenge the "ruling" by opposing counsel, who is usually the counsel for the County and the BZA.

6. When the County Planning Administrator "testifies" about the two sets of maps, (BZA Transcript, p. 30), he is referring to the set of pencil colored maps that they introduced, but not the second set of pencil colored maps. The other maps referred to are the 1972-73 rezoning maps.

7. The crux of the County Planning Administrator's "testimony" is that someone in the Planning Office kept an unofficial set of pencil colored maps, which were colored in after rezonings and which are the best evidence of the boundaries of each rezoning. Most interestingly, the Planning Administrator did not know there was a second set of pencil colored maps on the same County storage shelf with conflicting information about this parcel. If there were discovery, there would have been the discovery of the second set of pencil colored maps and the end of this valueless line of "testimony." If there had been cross-examination, this line of "testimony" could have been countered.

8. Similarly, if there had been discovery granted, or maybe even just an oath administered, or cross-examination permitted, the County Planning Administrator could not have testified that the County was not be consistent in stating in ordinances when a part versus the whole was to be effected. He "testified..."

> **...the Board was not, the County was not consistent at that time. On this particular rezoning, there's several pieces of property that**

are part of the parcel. One is the subject in question. One is Tax Map No. 65, parcel 19, which includes Mr. Marsh's property at this time. However, you can see the recording of the rezoning clearly shows a line that is not coincidental with the property line of this parcel 19. [He is referring to the pencil colored maps, not a part of the ordinance or permit record, as being the *ne plus ultra* test of what land was actually rezoned and granted a Use Permit]. Parcel 19 includes the area that was colored as rezone and then the white was not colored and therefore not part of that zone....

"Therefore my decision was that in 1969 the parcel of Mr. Marsh and the subject of this hearing was not rezoned to manufacturing [what industrial zoning used to be called] what the conditional use was and that was the basis for my decision. (BZA Transcript, p. 32., line 9, *et seq.*)

The importance of the County Planning Administrator's "testimony" cannot be overemphasized. The BZA members picked it up unambiguously...

(BZA Transcript, p. 33, line 8)

Mr. Caperton: [a Board Member] "It's probably not likely that they would include another airport at the base of the parcel....

Mr. Moore: [speaking to the Planning Administrator] Tom you mentioned that there was no specific map for the rezoning? [meaning an official map in the rezoning file]

Planning Administrator: No Sir.

Mr. Moore: And you made a statement on there that this was usually a case that you depended upon that people can make a mistake but what are the chances at making a mistake on something like this? [referring to the pencil colored maps]

Planning Administrator: My personal opinion is that the chances are very remote... [that there would be a mistake in the pencil colored maps]

We know from the second set of pencil colored maps that the actual chance of an error, unknown to the Planning Administrator, was 100%! (Yet this was not admissible evidence in the Circuit Court appeal!)

Here is a Board Member speaking from the transcript towards the end of the hearing picking up on the just-referenced testimony of the County Planning Administrator:

> **"We've heard from Mr. Jacobsen, [County Planning Administrator] that his research shows that back *in the old days* [emphasis added], when they were just proposing to affect a portion of the tax map they didn't really indicate it and in some cases they just referenced the entire map to identify the parcels that were affected. . . I don't think we can draw any conclusions and we can assume that the entire parcel was, each of those tax map parcels was rezoned or was affected by the action taken by the Board of Supervisors. . . [He goes on to discuss the number of acres rezoned saying]. . . I think that the zoning map that's in the custody of the agency for the County that are charged**

with the duty in determining and enforcing the Zoning Ordinance is the best evidence we have here to tell us exactly what was rezoned. (BZA Transcript, p. 86, line 15, *et. seq.*).

Please see BZA Transcript, p. 42, line 20, *et seq.*, for a reference to the fact that witnesses are not sworn.

Consistent with the non-adjudicative, political nature of the hearing towards the end of the hearing, the BZA member asks for public opposition to the Appellant's position. (BZA Transcript, p. 74, line 17, *et. seq.*). The Appellants say that they have support from the public who are there to speak, but they are *not allowed to speak!* Another instance of lack of due process.

It is clear from the transcript that the pencil colored maps, unofficial maps that the Board of Supervisors did not see and did not control, but that employees of the County kept, were seen by the BZA in error, as the best evidence of the land rezoned and Use Permit granted in this case, clearly in error, due to the lack of due process in the BZA case. The story about the *old days* and the inefficiencies of the people in the government back in the late 1960's and 1970's, which was not so very long ago, should not justify taking the written language of a County Ordinance out of effect. There was not one word of justification to support the judgment that back in the *old days* the people were any less competent than they are now, and no evidence on the record that shows how this was true regarding Chesterfield ordinances, no swearing of witnesses, no discovery, and no cross-examination which could

show the shallowness with which the BZA proceeded.

As we will see in the analysis of the proceedings at the Circuit Court, all of the errors at the BZA level ere acceptable and there would be no opportunity to ever correct the failures of justice at the BZA level.

. AT THE BZA HEARING THERE WAS NO GENUINE TESTIMONY
BY COUNTY WITNESSES, BECAUSE TESTIMONY MUST BE
SWORN; THERE WAS NO LEGITIMATE MEANS TO
INTRODUCE OTHER EVIDENCE, WHICH ELIMINATED ALL
THE COUNTY'S EVIDENCE FROM LEGITIMATE CONSIDERATION.

It is the Appellants' position that all of the words spoken by the witnesses for the County at the BZA hearing did not rise to the level of testimony as it is generally accepted in an adjudicative hearing. The Marshs make the distinction between general conversation or political speech on the one hand and speech that rises to the level of testimony on the other.

In general conversation or political speech, one may have many opinions and take positions which are intended to persuade, but those not under oath statements do not rise to the level of reliability that we think sworn statements have, (regardless of whether or not the oath is consistently successful in inducing the speaker to tell the truth). What is said in those circumstances where

an oath or affirmation is involved is expected to be of a higher quality of truthfulness than the quality of speech intended to be elicited at, let's say, a zoning hearing.

The ultimate impact of what is said at, for instance, a zoning hearing is an expression of the political will of the speaker. The speaker is usually for or against the subject of discussion and even experts who speak are directly in the employ of either a proponent of the pro or con side of the debate with no particular reason to "tell the truth" as we believe a speaker is when he is under oath in an adjudicative forum, an investigative process like a grand jury or making a statement under oath for some governmental process.

The Marshs argue that there was no testimony by any witness on behalf of the County because none of the words spoken were under oath. The Court of Appeals has addressed this subject albeit for a different purpose (perjury) in *Scott v. Commonwealth*, 14 Va. App. 294, 416 S.E. 2d 47, (1992). In that case the Court raised a number of different scenarios where a person might give "testimony" for the purposes of deciding when a person might be susceptible of being charged with perjury.

While the purpose in that case is different than in the case at bar, the key element, the administration of the "oath" or some legal equivalent, was the determining factor. And the Court said:

> ...The use of the words, "testimony" and "testify" in the various sections of the Code enumerated above, lead us to

> **conclude that the term, "give testimony"... encompasses any material declaration made under oath, whether *ex parte* or in an adversary proceeding subject to cross-examination.... p. 298.**

The Appellants asked that the witnesses be sworn as the BZA hearing began, but this does not appear on the record because it may have occurred before the case was called. This issue was raised again at the conclusion of the County's case on the record. (BZA Transcript P. 42, line 20). At all times the Appellants' reasonable request was rebuffed. Appellants unsuccessfully raised the issue of the lack of due process at the Circuit Court appeal based on the failure to obtain oaths and the failure to permit the confrontation or witnesses. Please see the March 8, 2001, Circuit Court Transcript, P. 5, *et. seq.*

Since there was no genuine testimony by County witnesses by the County's and the BZA's chosing, nothing they did there supports a finding that the County should prevail and the fact they were so opposed to normal due process is indicative of the fact that this matter should not be returned to the BZA or Circuit Court, if at all possible.

Based on the above, there is no factual or legal basis for the BZA or the Circuit Court findings in favor of the County, and the Appellants should prevail as they were ready to be sworn and give evidence and ready to confront witnesses as necessary to pursue their rights.

In the case at bar, at the hearing before the Board, the petitioners were never told about the matters of fact which were going to be asserted. Instead they were greeted with insinuations about

prior conduct of which they had no notice, (BZA Transcript, p. 9, the tree cutting issue). Our objection to the irrelevant issue attempting to poison the well against the petitioners did not stop the County from bringing this up again. (Please see BZA Transcript, pp. 22-27). Petitioners were denied the right to have witnesses subpoenaed (BZA Transcript, p. 42, line 15); they were denied the right to cross examine or even question the County's witnesses, (BZA Transcript, pp. 20 and 21, p. 27, line 17); no oaths were administered even though the petitioners requested this. (BZA Transcript, p. 42, lines 20-21). There are also letters in the file asking for this before the hearing. The Board refused to exclude poisonous references to irrelevant matters such as the cutting of trees by some unknown person(s), all of the County's evidence was insubstantial but so much as the test of an oath was not afforded petitioners. In the end, no rebuttal was permitted petitioners. This was not close to a full and fair hearing, and there is no way that the petitioners should be forced to go back to the Board to have this treatment again.

The hearing before the Board was fatally defective and the Circuit Court did nothing to correct these injustices. The trial judge should have permitted the petitioners to submit all of the facts anew, with full discovery and apply the appropriate law.

q. Notes from BZA hearing transcript.

1. There is the presentation of the appeal itself where the citizen is attempting to present its appeal in a way that clearly states his case. We note that this is **his appeal** and not

the appeal of the County so, logically, and usually the procedure would permit him to make his best case but no, the County get to make its best case first **adding to the impression that the County has already made that they were making a neutral presentation to begin with, when they are advocating against the petitioners. See Transcript p. 8 where counsel requests to put on petitioner's case first.**

2. There is the **poisoning of the well tactic by the County where on page 9, the County starts to bring up the issue of the cutting of certain trees, which they have no clue who did, and they are trying to suggest was done by Mr. Marsh. Note my objection to the relevancy of this issue on line 23, page 9 of the BZA transcript.**

3. See the discussion of the safety of ultralight aircraft. Transcript p10, line 1.

4. For the beginning of the legal argument that the unofficial, pencil colored drawings are better evidence of the true status of the airport Use Permit and industrial zoning boundaries, over the written official records of the County see BZA transcript p. 12, line 13.

5. See BZA transcript p. 20, line 25, where petitioners ask for permission to cross-examine witnesses. See the BZA answer on p. 21, line 2. "We will get to that."

6. See at end of Calabro's statement, BZA transcript, p27, line 17, where petitioners want to cross-examine and ask permission to ask a question. Opposing counsel states that the witness will only stay to answer the Board's questions. The BZA adopts the ruling by their usual counsel by saying nothing in response to his remarks.

7. BZA transcript page 27, is where Jacobsen's statements begin based on his review of the documentation in the planning office. Makes

unsupported arguments that the unofficial pencil drawings are better evidence of the facts of the rezoning at the time of the creation of the airport than the official written records. He has no personal knowledge of any of this because it predates his employment. All statements not under oath and without cross examination. The actual testimony goes much further.

References to the BZA transcript are made in the body of the petition.

No. 02-1145

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FEB 27 2003

In The

Supreme Court of the United States

WALTER R. MARSH and CHARLOTTE D. MARSH,

Petitioners,

v.

BOARD OF ZONING APPEALS OF CHESTERFIELD COUNTY and COUNTY OF CHESTERFIELD, VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a property owner who has been given the opportunity to present to a local Board of Zoning Appeals ("BZA") his appeal of a notice of zoning violation issued by the local government's zoning administrator; to question and confront witnesses; and to discover all relevant documents in the possession of the local government's zoning administrator has received due process.

2. Whether the highest court of a state has the authority to interpret the state's constitution and to fashion an appropriate remedy if the state's constitution has been violated.

PARTIES TO THE APPEAL

All parties appear in the caption of the case on the cover page.

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STATEMENT OF THE CASE

A. Procedural Posture of the Case.

The appellants, Walter W. Marsh and Charlotte D. Marsh (collectively "Marsh") own two parcels of land (the "Property") adjacent to the Chesterfield County Airport (the "Airport"). In 2000, Marsh began flying a lightweight type of glider aircraft, known as an "ultralight", from the Property and directly into the flight takeoff and landing pattern of the Airport.[1] Marsh's actions constitute an airport use under Section 19-301 of the Chesterfield County Zoning Ordinance.

Under the County's zoning ordinance, airports must have a conditional use permit. Marsh's property is zoned Agricultural and does not have a conditional use permit to engage in airport use. Accordingly, the County zoning administrator served a notice of zoning violation on Marsh advising him that he was violating the zoning ordinance. Marsh filed an appeal of the notice of zoning violation to the Chesterfield County Board of Zoning Appeals ("BZA") pursuant to Va. Code § 15.2-2311. The BZA heard the appeal on July 5, 2000 and upheld the notice of zoning violation.

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[1] The Airport is the 11th largest airport in the State of Virginia with 115 aircraft based onsite and over 75,000 "operations" or takeoffs and landings annually. The State Police maintain their helicopter evacuation and support unit at the Airport, where they base two public safety helicopters. (See BZA Tr., pp. 21-27).

Marsh appealed the BZA's decision to the Chesterfield County Circuit Court, a state trial court of record, pursuant to Va. Code § 15.2-2314. The trial court conducted a hearing on Marsh's appeal on March 8, 2001. In its letter opinion dated July 3, 2001, the trial court ruled pursuant to § 15.2-2314 that no evidence beyond the evidence already in the record of the BZA appeal was necessary for the court to review the BZA's decision and that the BZA's decision should be upheld as a matter of law. However, at an October 5, 2001 hearing for entry of the final order, counsel for Marsh contended that he had not had sufficient opportunity to argue the case orally. The trial court held another hearing for oral argument on February 25, 2002. At the conclusion of the second hearing, the trial court entered a final order upholding the decision of the BZA. Marsh appealed the decision to the Virginia Supreme Court. The Virginia Supreme Court declined to hear Marsh's appeal, finding no reversible error, and subsequently denied Marsh's request for a rehearing. Marsh then filed this appeal.

B. Statement of Facts

Beginning in February 2000, the County received complaints from users of the Airport that Marsh was flying "ultralight" aircraft from his Property which abuts the County Airport. The ultralight aircraft were taking off and landing on the Property using a flight path that caused the ultralights to fly directly into the takeoff and landing pattern for aircraft using the Airport. (BZA Tr., pp. 21-27). The County Planning Department determined, and Marsh

conceded, that Marsh's ultralight flights constituted the operation of an airport as defined in the County's zoning ordinance. (BZA Tr. pp. 11-16). Marsh's Property is zoned Agricultural and airports are not a permitted use in an Agricultural zoning district without a conditional use permit for an airport granted by the County's governing body, the Board of Supervisors. See County Code § 19-126(e). Marsh does not have a conditional use permit to operate an airport on the Property. (BZA Tr., pp. 27-34, 75-78). On April 7, 2000, the County's zoning administrator issued Marsh a notice of zoning violation informing him that to bring his Property in compliance with the Zoning Ordinance, he needed to either cease flying aircraft from it or obtain a conditional use permit from the Board of Supervisors. (BZA Record, Notice of Violation). Marsh did not apply for a conditional use permit. Instead, on May 16, 2000, Marsh appealed the notice of violation to the BZA pursuant to Va. Code § 15.2-2311.

At the BZA hearing Marsh was represented by counsel and was permitted to call witnesses and present evidence. (BZA Tr., pp. 41-42, 51, 73). Prior to the hearing, Marsh had indicated he might want certain County employees to testify at the hearing. All of these employees were present at the hearing and prepared to testify if Marsh had chosen to call them. (BZA Tr., pp. 2-4, 41-42). Marsh also introduced several exhibits that he obtained from his extensive discovery of the County's Planning Department records and Board of Supervisors' minutes. (BZA Record, Marsh Freedom of Information Act Requests and BZA Tr., pp. 51-64)

The County also introduced exhibits which established that Marsh's Property had never been zoned for airport use including: (1) minutes of the Board of Supervisors' September 24, 1969 meeting at which the Board rezoned the County's Airport property from agricultural to industrial with a conditional use permit; (2) zoning maps that showed the land which was actually rezoned for the County Airport; and (3) minutes of the comprehensive rezoning ordinance adopted by the County's Board of Supervisors on November 27, 1972, effective January 1, 1973, which rezoned the entire County and confirmed that Marsh's Property was zoned Agricultural and had no conditional use permit for an airport. (BZA Tr., pp. 30-35).

Nevertheless, Marsh contended that his Property actually had been rezoned on September 24, 1969, relying on contradictory and incomplete tax map information contained in the minutes of the 1969 Board of Supervisors' meeting. (BZA Tr., pp. 56-58). The BZA rejected Marsh's argument because the zoning maps which were prepared after the rezoning and were the only evidence which established the precise boundaries of the Airport rezoning showed that Marsh's Property was not rezoned for airport use. (BZA Tr., pp. 30-34; BZA record, zoning maps).

Marsh also contended that the 1972 comprehensive rezoning which re-confirmed that his property was not part of the Airport rezoning was invalid because the minutes of the comprehensive

rezoning did not reflect the vote of individual Board of Supervisors' members as required by Article VII, Section 7 of the Virginia Constitution. The BZA rejected this argument, relying on Town of Madison v. Ford, 255 Va. 429, 498 S.E.2d 235 (1998). (BZA Tr., pp. 65-69, 87-88).

At the conclusion of an approximately two-and-a-half-hour hearing, the BZA voted unanimously to uphold the decision of the zoning administrator to issue the notice of violation. The BZA's decision was upheld on appeal by the trial court, and the Virginia Supreme Court found no error in that decision and declined to hear Marsh's appeal.

REASONS FOR DENYING THE WRIT

A. The Petition for Appeal Does Not Identify a Compelling Reason for the Court to Grant Certiorari.

Review on a writ of certiorari is not a matter of right, but of judicial discretion, and a petition for a writ of certiorari will be granted "only for compelling reasons." Rule 10, Rules of the Supreme Court of the United States. The types of "compelling reasons" for which a petition will be granted are illustrated in Rule 10 and include: (1) a conflict among the United States courts of appeals, or between one or more courts of appeals and one or more state court of last resort on some important federal question; and (2) a decision by a state court or a United States court of appeals on an important federal question that has never been settled by this Court.

Marsh's Petition for a Writ of Certiorari does not identify any important federal question in which there is a conflict between federal appellate courts or between state and federal appellate courts. It also does not identify any important federal question that this Court has never settled. Despite Marsh's effort to invoke constitutional issues, this case is nothing more than a local zoning dispute arising out of the improper use of land. Federal courts do not sit as "super zoning boards" or as federal boards of zoning appeals. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 121 (1978).

The record establishes that Marsh had a full and fair opportunity to present his case to the BZA. Marsh also had the opportunity to appeal the BZA's decision to the Circuit Court of Chesterfield County, Virginia, and to the Supreme Court of Virginia in accordance with Virginia law. Marsh's due process challenge is nothing more than an effort to prolong an appropriately concluded state legal process simply because Marsh is unhappy with the State court's resolution of that process.

B. Marsh Received a Full, Fair and Impartial Hearing Before the BZA and is Entitled to No Process Other Than The Process Which He Has Already Received

Even though he was represented by counsel, had a full opportunity to present his case, received access to and copies of all County documents which he requested, and was given the opportunity to examine any County employee whom he wanted to question, Marsh complains that he was denied due process in the manner in which the BZA hearing was conducted. Marsh's complaint is not supported by the record.

First, the record establishes that Marsh was given an opportunity to examine every witness he wished to examine.[2] (BZA Tr., pp. 41-42, 51, 73). Second, despite Marsh's complaint that he was not allowed to subpoena the County witnesses he wanted to call, the record establishes that the County voluntarily made all witnesses whom Marsh requested

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[2] In reality, Marsh is complaining only that the BZA, in keeping with normal practices of boards of zoning appeals throughout Virginia, allowed each side to present its own case without interruption, which meant that Marsh's opportunity to confront and examine the County's witnesses came within the presentation of his own case, just as the County's opportunity to examine Marsh's witnesses occurred during the presentation of the County's case.

available for him to question at the hearing.[3] Accordingly, there was no reason for any subpoenas to be issued, and the Chairman of the BZA properly exercised the discretion granted to him by Va. Code § 15.2-2312 not to subpoena witnesses. (BZA Tr., pp. 41-42). Third, Marsh's contention that he was not given an opportunity to discover the County's documents is belied by the record which establishes that Marsh obtained numerous documents from the County through the Virginia Freedom of Information Act and that he introduced those very documents into evidence at the BZA hearing. (BZA Tr., pp. 51-64; and BZA Record, Marsh Freedom of Information Act requests).

In addition, Marsh cites no authority to support his claim that he has a due process right to have witnesses sworn, and the County is unaware of any such constitutionally mandated requirement. The BZA appeal process, as provided in Va. Code § 15.2-2312,

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[3] Even though the record establishes that all County witnesses whom Marsh wished to examine were present and available to testify, Marsh contends that the witnesses were only available for the benefit of the County and the BZA (Petition, pp. 6-7). In an effort to support his contention, Marsh cites a document reprinted as an Appendix to his Petition that is Marsh's counsel's notes during the hearing (Petition, pp. civ-cvi). Those notes, which are not part of the record in this case, are directly contradicted by the BZA transcript which is part of the record and which establishes that all witnesses who Marsh requested to examine were present and available to Marsh at the BZA hearing. (BZA Tr., pp. 41-42).

expressly grants discretion to the BZA Chairman to decide whether witnesses should be sworn. Marsh cannot complain about a denial of due process when the process he chose to use expressly provides that the BZA Chairman has the discretion not to swear witnesses.

The record establishes that the BZA followed the process set forth by Va. Code § 15.2-2309, et. seq. in all respects. Indeed, Marsh has not alleged that the BZA failed to do so. Instead, Marsh contends that irrespective of the statutory procedure prescribed for BZA hearings, he was entitled to have the BZA hearing conducted in the same manner that a hearing would be conducted if it took place in a court of law. Marsh has cited no constitutional authority for such a proposition, and the County has found no such authority.

C. Marsh Cannot Use This Case to Collaterally Challenge a Previous Ruling of the Virginia Supreme Court Which Interprets the Virginia Constitution.

In his second assignment of error, Marsh contends that the Virginia Supreme Court, which is not and cannot be a party to this action, violated his due process rights by deciding the case of Town of Madison v. Ford, 255 Va. 429, 498 S.E.2d 235 (1998) in a manner that he believes is inappropriate. Marsh offers no legal support for how this Court can reverse the five-year old precedent of the Virginia Supreme Court, nor does Marsh offer any explanation as to how or why Town of Madison denies his due process rights. It is certainly true that Town of Madison is fatal to Marsh's appeal,

because Town of Madison establishes the validity of the 1973 comprehensive rezoning of the County, which confirms that Marsh's property is not zoned to permit an airport use. But the fact that Town of Madison mandates the dismissal of Marsh's case does not mean that the Virginia Supreme Court has denied Marsh his due process rights.

In Town of Madison, the Virginia Supreme Court interpreted a provision of the 1972 Virginia Constitution which requires the minutes of the meetings of local governing bodies to record the vote of each member of the governing body on all ordinances, resolution and other legislative acts. In a 4-3 decision, the Virginia Supreme Court decided that minutes which recorded a "unanimous" vote of a local governing body did not comply with the requirement of the Virginia Constitution that the vote of each member of the governing body be recorded. Moreover, the Supreme Court determined that the consequence of failing to comply with the requirement was that the action of the governing body was rendered void *ab initio*. Recognizing the potential disruption that the ruling could have on local governments who thought they had been complying with the constitutional provision, the Supreme Court held in Town of Madison that its ruling was prospective only and would not affect the validity of ordinances adopted prior to the date of the Town of Madison decision, February 27, 1998.

The Virginia Supreme Court's interpretation of the Virginia Constitution in Town of Madison is precisely the type of decision that the Court was created to make, and the decision in no way implicates the United States Constitution or any other federal question that would invoke this Court's jurisdiction. Accordingly, Marsh's characterization of Town of Madison as a decision that "ignores and thus voids an unambiguous requirement of the Virginia Constitution" is specious. Marsh cannot characterize the Town of Madison decision as a violation of his due process rights merely because it interprets the Virginia Constitution differently from the way he would choose to interpret it or because the effect of the Supreme Court's interpretation is to confirm the validity of the County's 1973 comprehensive zoning ordinance.

CONCLUSION

Pursuant to rights granted to him under Virginia law, Marsh appealed the County's determination that his airport operation violates the County's zoning ordinance to the local BZA. The BZA's proceedings complied in all respects with the requirements of Virginia law and the BZA rejected Marsh's contentions and denied his appeal. Marsh cannot re-characterize this state law zoning dispute as a federal constitutional question simply because he is unhappy with the BZA's decision or the decisions of the Chesterfield County Circuit Court and the Virginia Supreme Court upholding the BZA's decision. Marsh is inviting this Court to become involved as a "super board of zoning appeals" in the kind of local land use dispute that is decided on a daily basis by local zoning

administrators and zoning boards in accordance with established statutory procedures. The respondents respectfully request that the Court deny Marsh's Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 7 2003
OFFICE OF THE CLERK

No.02-1145

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Board of Zoning Appeals of Chesterfield County
and
County of Chesterfield, Virginia

On Petition For Writ of Certiorari
To The Supreme Court of Virginia

REPLY BRIEF

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REPLY:

General Statement

The respondents herein do not appreciate the distinction between an adjudicatory hearing with minimal due process, which is constitutionally required to take a citizen's vested property rights, and a political hearing where the exercise of greater political power prevails.

This is a property rights case where vested real property rights are being taken without minimal due process in violation of the U.S. Constitution. This is not a public safety case, a case about an application for new property rights or a case where the petitioners are to be punished or rewarded according to criteria other than the legal criteria for the vesting or taking of property rights. All other issues raised by respondents are irrelevant.

The reasoning of the County is circular and flawed. The County says that because the Marshes do not have the rights the Marshes claim, that the Marshes are not entitled to minimal due process because those rights are reserved for those who actually have the rights they claim. By this reasoning no one is entitled to due process before taking real property rights except those who in the mind of the County have those rights, but, of course, those who have property rights in the County's mind do not need due process because those people will not be challenged. This flawed reasoning continues from the administrator's ruling letter to the BZA hearing, to the trial court where the County argues that the trial court cannot review the constitutional issues presented by the lack of due process and to the Virginia Supreme Court where this circular reasoning continues to hold sway.

The test of whether the Marshes have the right to make these claims which is based on the existence of the elements of their claim based on the duly enacted County ordinance granting the Use Permit and industrial zoning to specified parcels of land, particularly where the first parcel listed in the ordinance is the undisputed predecessor of the Marshes' parcel. The other elements of the Marshes' claim to vested property rights are undisputed and do not need mention here.

It cannot be disputed that the petitioners asked that witnesses be sworn and that they have the right of confrontation at the BZA hearing. It cannot be denied that the Board of Zoning Appeals denied these fundamental requests in the only trial setting the Marshes had which was due to the County's structuring of the legal process. The letter ruling clearly stated that the Marches' sole remedy to prevent the ruling letter from becoming law was to appeal to the BZA within 30 days (App. P. V).

It cannot be denied that the County used unsworn statements about unofficial records to overrule the official County records of their ordinances. It cannot be denied that the later 1972-73 Countywide Rezoning Ordinance was not enacted according to the plain meaning of the Virginia Constitution requiring the vote of the individual Board Members to be recorded. Each adjudicator closed their eyes to this patent flaw in furthering the errors of the Board of Zoning Appeals, by refusing to address due process and constitutional issues based on the erroneous arguments of the County.

Either the Marshes have the Use Permit to operate an airport and industrial zoning or they do not. If they have the facial right as the ordinance says they do, they are entitled to an adjudicatory hearing with sworn witnesses and the right to confront witnesses, before those rights are taken from them. Due process

was denied the Marshes and this Court is the appellate Court of last resort where the violation of these rights can be restored.

OBJECTIONS TO RESPONDENT'S MISSTATEMENTS

1. The trial court upheld the BZA hearing simply because it believed that it did not have the authority to review the constitutional issues presented in the appeal, relying in error on the County's arguments. It believed that the denial of due process in the BZA hearing and the failure of the County to adhere to the provisions of the Virginia Constitution were beyond its reach. The decisions of the Virginia courts regarding the political decisions of the BZA were applied in error to the case at bar, where the BZA was supposed to sit as an adjudicatory body affording at least minimal due process.

2. It is incorrect to call the speakers at the BZA hearing "witnesses" because they were not sworn, and therefore they were incapable of giving "testimony" as we use that term in American jurisprudence.

3. The County did not properly introduce any evidence at the BZA hearing because there was no foundation of testimony supporting it.

4. At the BZA hearing the County sought to deny the effectiveness of the ordinance that enacted the County Airport and Industrial Park. The County sought to degrade its official records and subject them to unofficial records and speculation.

5. The alleged zoning maps used to overturn the plain language of the County Ordinance were unofficial and essentially notes that the planning administrator's office kept without reference as to how the maps were marked or modified and were for a period before the tenure of the administrator who

"testified." Interestingly, discovery would have shown that there was another set of informal maps in conflict with the one the County "introduced."

6. The BZA's and the trial court's reliance on ***Town of Madison v. Ford*** is based on a misinterpretation of the case that voids the requirement of the Virginia Constitution to record the votes of each Board Member in a County government to validly enact an ordinance. That interpretation has been erroneously adopted by a number of Virginia Circuit Courts, but not all, and where this interpretation prevails, the parties in error state that Article 7, Section 7 of the Virginia Constitution, requiring the recording of each Board Members vote to enact an ordinance only operates for ordinances enacted after the date of ***Town of Madison v. Ford.*** It is virtual heresy for a Court to say that it can void a plain and straightforward provision of the Constitution that created it; that it can nullify the plain meaning of a part of the Virginia Constitution. Such acts are ***ultra vires per se*** and should be overturned.

7. The precise statements from the record denying the petitioners the right of confrontation of witnesses are included in the petition for writ (Petition, pp. 6-7). The counsel for the County ruled from the floor that this was not going to be allowed; that the witnesses were held for the BZA panel's questions only, and this was never countered by the panel.

8. Marsh was denied all discovery that could have been permitted by the BZA and instead relied on some freedom of information rights to get some information. This information did not come close to giving Marsh the information he needed to adequately prepare for the BZA hearing.

9. The Marshes never asked for a proceeding that was equivalent to a court; they have always and at each level demanded the minimal due process to which they are constitutionally entitled.

10. It is simply bizarre for the County to try to claim that Marsh chose the BZA as the place to try the "appeal," but really this only merits "trial" of his rights. The County chose to use the zoning administrator's letter ruling to adjudicate the matter and this left the Marshes with no choice but to use the statutorily mandated appeal to the BZA. The County chose the forum where the adjudicator mistakenly thought it had the right to deny the Marshes their U.S. Constitutional rights, all the while opposing the petitioners legitimate requests for minimal due process.

11. There is nothing wrong with the Virginia Supreme Court's decision in ***Town of Madison v. Ford.*** It is the way that the Circuit Courts are interpreting it that is fundamentally flawed. In ***Madison v. Ford***, the Supreme Court upheld a citizen's rightful attack on an unconstitutionally enacted ordinance, just like the attack the Marshes made on the 1972-73 Chesterfield County, countywide rezoning ordinance. In ***Madison v. Ford***, the vote of the Board Members was not individually recorded so the ordinance fell. This parallels what Marsh asked to be done with the 1972-73 countywide rezoning ordinance. The issue is in the interpretation of the Supreme Court's statement that they were not going to strike down all of the government's ordinances on a wholesale basis, but that they would enforce the law of the case ***prospectively***.

The misinterpretation of the Circuit Courts is in their understanding of this statement to mean that ordinances dating from before the ***Madison v. Ford*** case could no longer be attacked on this constitutional basis. This is patently wrong. The court could not say such a thing because it voids the existence and operation of a provision of the Virginia Constitution. A court cannot change the plain meaning of a constitutional provision when it is the very constitution

that created the court and is the very source of its authority.

The correct interpretation of the ruling is that the Virginia Supreme Court would not seek to overturn ordinances helter skelter creating disruption, but warned the governments of counties that in the future it may. The prospective ruling is that it would take another lawsuit to invalidate additional ordinances and that if someone had the spunk and tenacity to survive the legal process that the court would be duty bound to enforce the voting requirement in the Virginia Constitution. This is what the Marshes are respectfully demanding here, that the appellate courts enforce the Virginia Constitutional requirement that the individual votes of the Board Members be recorded or the ordinance fails.

12. Marsh relies on the appellate court system to right these wrongs to his constitutional rights and to right the ***ultra vires*** application of case law that cancels a portion of the Virginia Constitution.

CONCLUSION

The Marshes never had an adjudicatory hearing with minimal due process to take their vested property rights. The County set up the legal procedure so that the Marshes had to appeal to the BZA from the zoning administrator's letter ruling, placing them in the position of having to ask for their minimal due process, and then having the County argue in that forum that the Marshes were never entitled to have minimal due process. Now, at this petition, the County continues to attempt to explain away why the Marshes did not have their minimal due process below by arguing that they were only entitled to a political hearing before a board that could and did refuse to allow the alleged witnesses to be sworn and denied the petitioners the right to confront the County's alleged "witnesses." There will

be no justice for the Marshes unless the United States Supreme Court take this case up. Wherefore, do the petitioners pray that the writ of certiorari be granted.

Respectfully submitted,
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